82-862

No.____

Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

THOMAS LESTRANGE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HARRY A. RISSETTO*
1800 M Street, N.W.
Washington, D.C.

DENNIS J. MORIKAWA
KENNETH D. KLEINMAN
2100 Fidelity Building
Philadelphia, PA 19109

DENNIS ALAN AROUCA
1138 Six Penn Center
Philadelphia, PA 19103

Of Counsel:
MORGAN, LEWIS & BOCKIUS

**Counsel of Record*

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 238-2000

QUESTIONS PRESENTED

1. Whether a handicapped applicant for employment may maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, where the primary objective of the employer's Federal financial assistance is unrelated to employment?

2. Whether a handicapped applicant for employment who cannot demonstrate a nexus between the denial of employment and a specific program supported by Federal financial assistance may nevertheless maintain an employment discrimination action under Section 504 of the Rehabilitation Act?

3. Whether a private right of action exists under Section 504 of the Rehabilitation Act?

PARTIES TO THE PROCEEDING

Petitioner Consolidated Rail Corporation respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 1, 1982. Respondent is Thomas LeStrange, a handicapped applicant for employment with Petitioner.[1]

---

1. Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioner herein discloses the following subsidiaries (except wholly owned subsidiaries) and affiliates of Consolidated Rail Corporation, with the percentage of stock interest held by Petitioner noted in parentheses: The Akron & Barberton Belt Railway Company (50%); Albany Port Railway Corporation (50%); The Belt Railway Company of Chicago (15.38%); Calumet Western Railway Company (25%; 50% of this company is owned by Indiana Harbor Belt Railroad Company, a subsidiary of Petitioner); The Canada Southern Railway Company (71.44%); Chicago & Western Indiana Railway Company (20%); Fruit Growers Express Company (23.52%); Indiana Harbor Belt Railroad Company (51%); The Lake Erie & Eastern Railroad Company (50%); The Lakefront Dock and Railroad Terminal Company (50%); The Monongahela Railway Company (33.33%); Nicholas, Fayette & Greenbrier Railroad Company (50%); Peoria & Pekin Union Railway Company (25.64%); Pittsburgh Chartiers & Youghiogheny Railway Company (50%); Terminal Railroad Association of St. Louis (12.5%); Toledo Terminal Railroad Company (42.87%); Trailer Train Company (4.78%).

TABLE OF CONTENTS

	Page
Statement of the Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	v
Citation of Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	5
Reasons for Granting the Writ	8
A. Introduction	8
B. The Third Circuit's Decision That the Purpose of Federal Assistance Is Irrelevant in Determining the Applicability of Section 504 of the Rehabilitation Act Conflicts With Decisions of the Courts of Appeals for the Second, Fourth, Eighth and Ninth Circuits	9
C. The Third Circuit's Decision, Which Failed to Require a Nexus Between a Specific Program Supported By Federal Financial Assistance and the Denial of Employment to LeStrange, Is in Direct Conflict With the Decision of This Court in *North Haven*, As Well As the Decisions of Other Courts of Appeals	16
D. The Third Circuit's Decision Erroneously Assumed, Without Discussion, That a Private Right of Action May Be Implied Under Section 504 of the Rehabilitation Act	21
Conclusion	24

TABLE OF CONTENTS *(Continued)*

Page

Appendix:

Opinion of the Court of Appeals A-1

Opinion of the District Court A-25

Order of the District Court, October 20, 1981 . . A-52

Opinion of the District Court A-53

Order of the District Court, November 4, 1980 . A-64

Amended Judgment of the District Court A-65

Judgment of the Court of Appeals A-66

Order of Stay of Mandate of Court of Appeals . . A-67

Order of Further Stay of Mandate of Court of Appeals A-67

TABLE OF AUTHORITIES

Cases: Page

Arnett v. Kennedy, 416 U.S. 134 (1974) 15

Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) . 21 N.14

Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947) 23

Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981) 19, 20

Cannon v. University of Chicago, 441 U.S. 677 (1979) 22

Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980) 10, 11, 13

Doyle v. University of Alabama, No. 81-7697 (11th Cir. July 19, 1982) 20

Grove City College v. Bell, 687 F.2d 684 (3d Cir.) *petition for cert. filed*, ____ U.S.L.W. ____ (U.S. Nov. 9, 1982) (No. 82-792) . 18 N.9, 20 N.12, 21

Guardians Association v. Civil Service Commission of the City of New York, No. 81-431 (U.S. argued Nov. 1, 1982) 9, 22

Howard v. Penn Central Transportation Company, 87 F.R.D. 342 (N.D. Ohio 1980) 6, N.3

Jones v. Metropolitan Atlanta Rapid Transit Authority, No. 81-7746 (11th Cir. August 6, 1982) 11, N.5

LeStrange v. Conrail, 501 F. Supp. 964 (M.D. Pa. 1980) 1, 5 N.2

LeStrange v. Conrail, No. 78-0944 (M.D. Pa. filed October 20, 1981) 1, 14 N.7

LeStrange v. Conrail, 687 F.2d 767 (3d Cir. 1982) 1, 12, 13, 14, 18 N.9

TABLE OF AUTHORITIES *(Continued)*

Page

Lloyd v. Regional Transport Authority, 548 F.2d 1277 (7th Cir. 1977) 21 N.14

Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982) 11 N.4

National Association for the Advancement of Colored People v. The Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979) 21 N.14, 22

North Haven Board of Education v. Bell, ____ U.S. ____, 72 L.Ed.2d 299 (1982) . 8, 9, 11, 12, 13, 15, 16, 17, 18, 18 N.9

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 23

Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981) 20 N.12

Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982) 11, 13

Simon v. St. Louis County, Missouri, 656 F.2d 316 (8th Cir. 1981) 11 N.4

Simpson v. Reynolds Metal Company, Inc., 629 F.2d 1226 (7th Cir. 1980) 19

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 22

Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979) 9, 10, 11, 13

United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981) 11, 13

University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) 20

Youakim v. Miller, 425 U.S. 231 (1976) 23

TABLE OF AUTHORITIES *(Continued)*

Page

Constitutional Provisions:

Fourteenth Amendment 5 N.2

Statutory Provisions:

Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. §791 ..... 15 N.8

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 ..... *passim*

Section 505(a) of the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, 29 U.S.C. §794a 2-3, 9, 13, 15, 19

Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 *et seq* 6 N.3

Regional Rail Reorganization Act of 1973, 45 U.S.C. §726 6

Regional Rail Reorganization Act of 1973, 45 U.S.C. §743(b)(2) 6 N.3

Regional Rail Reorganization Act of 1973, 45 U.S.C. §§771-780 6-7

Regional Rail Reorganization Act of 1973, 45 U.S.C. §797a 7

Northeast Rail Service Act of 1981, 45 U.S.C. §1101 *et seq* 7

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d 3, 8, 10, 12, 17

Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C., §2000d-1 ..... 14, 17

Section 604 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d-3 ..... 4, 10, 11 N.5, 12, 13, 14, 15

TABLE OF AUTHORITIES *(Continued)*

Page

Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 4, 11, 12, 12 N.6, 17, 18 N.9

Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1682 17

28 U.S.C. §1254(1) 2

42 U.S.C. §1983 ..... 5 N.2

42 U.S.C. §2000e *et seq* 15 N.8

Miscellaneous:

Sen. Rep. No. 318, 93d Cong., 1st Sess. 18 (1973) 19 N.11

45 C.F.R. §80.3(c) 14 N.7

110 Cong. Rec. 1521 (1964) 19 N.10

Rules of the Supreme Court, Rule 28.1 ii

Stern & Gressman, Supreme Court Practice §6.27, 458-461 (5th ed. 1978) 23

The Washington Post, September 9, 1982, at A23 ..... 21 N.13

The Washington Post, October 11, 1982, at A17 . 21

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

THOMAS LESTRANGE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CITATION OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit has been reported at 687 F.2d 767 (3d Cir. 1982) and is included within the Appendix for Petitioner submitted herein, commencing at page A-1. The Opinion and Order of the United States District Court for the Middle District of Pennsylvania have not been reported and appear in the Appendix for Petitioner, commencing at page A-25. A prior Opinion and Order of the United States District Court for the Middle District of Pennsylvania are reproduced at page A-53 of Petitioner's Appendix and are reported at 501 F. Supp. 964 (M.D. Pa. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1982 (Appendix for Petitioner at page A-66). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §794, as amended Pub.L. 95-602, Title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987:

> Nondiscrimination under federal grants and programs; promulgation of rules and regulations
>
> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. §794a, Pub. L. 93-112, Title V, §505, as added Pub.L. 95-602, Title I, §120, Nov. 6, 1978, 92 Stat. 2982:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §2000d, Pub.L. 88-352, Title VI, §601, July 2, 1964, 78 Stat. 252:

Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d-3, Pub.L. 88-352, Title VI, §604, July 2, 1964, 78 Stat. 253:

> Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment
>
> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

20 U.S.C. §1681, Pub.L. 92-318, Title IX, §901, June 23, 1972, 86 Stat. 373:

> Sex
>
> Prohibition against discrimination; exceptions
>
> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

STATEMENT OF THE CASE

The Court of Appeals' decision involves the significant federal question of whether the mere receipt of Federal financial assistance by an employer, regardless of the nature, purpose and beneficiaries of such Federal financial assistance, is sufficient to enable a handicapped applicant for employment to maintain an employment discrimination action against the employer under Section 504 of the Rehabilitation Act of 1973, as amended by the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, 29 U.S.C. §794. This action was commenced on September 22, 1978 by Respondent Thomas LeStrange, who alleged that Petitioner Consolidated Rail Corporation ("Conrail") failed to employ him as a locomotive engineer by reason of his physical handicap, i.e. the amputation of his left hand and a portion of his left forearm. The jurisdiction of the District Court was invoked under, *inter alia*, Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 ("Section 504").[2]

The facts pertinent to this Petition for a Writ of Certiorari are not in dispute. LeStrange was initially employed by the Erie Lackawanna Railway Company as a locomotive engineer. As a result of an accident unrelated to his employment (LeStrange Deposition of October 8, 1981, at 5), LeStrange suffered the amputation of his left hand and a portion of his left forearm in March, 1971. At that time, he was placed on disability or medical

---

2. In his Amended Complaint filed on October 26, 1979, LeStrange also alleged that jurisdiction existed over Conrail with respect to his claims under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983, due to Conrail's status as an interstate common carrier. By order of November 4, 1980, Judge Rambo of the United States District Court for the Middle District of Pennsylvania granted Conrail's motion to dismiss these claims, but declined to dismiss any claims under Section 504 on the basis of the facts alleged in the amended complaint. *LeStrange v. Consolidated Rail Corporation*, 501 F. Supp. 964 (M.D. Pa. 1980).

leave and was awarded disability pay (LeStrange Dep. at 5). The Erie Lackawanna Railway Company declined to return him to service because of his inability to perform the job functions required of a locomotive engineer, and therefore he continued on disability leave. In 1978, despite having received disability benefits for seven years, LeStrange asked Conrail to consider him for employment as an engineer (LeStrange Dep. at 7).[3] LeStrange was examined by a physician on April 4, 1978 and was classified as not qualified for employment on May 2, 1978. LeStrange was dissatisfied with this finding and brought the instant suit. Subsequently, he was afforded the opportunity to participate in a field test administered by Conrail on February 15, 1979 to determine his ability to perform the duties of a locomotive engineer. LeStrange could not satisfactorily complete the test, but was offered a second opportunity to do so. LeStrange refused to cooperate and declined Conrail's offer. 501 F. Supp. at 966.

In his Amended Complaint, LeStrange alleged that jurisdiction existed over Conrail with respect to Section 504 by reason of Conrail's receipt of Federal financial assistance. There is no dispute in the instant matter that Conrail has received federal funding through the purchase of securities pursuant to Section 216 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. §726 ("Rail Act"). In addition, Conrail has received federal funding through reimbursement for employee protective

3. Conrail disputes LeStrange's allegation that Conrail became the successor-in-interest of the Erie Lackawanna Railway Company upon the enactment of the Regional Rail Reorganization Act, 45 U.S.C §701 *et seq*. In fact, Conrail was conveyed certain rail properties of northeast rail carriers in reorganization on April 1, 1976, ". . . free and clear of any liens or encumbrances . . ." 45 U.S.C. §743(b)(2). This has been interpreted to mean that Conrail is not a successor to employment-related claims against those rail carriers in reorganization. *Howard v. Penn Central Transportation Co.*, 87 F.R.D. 342 (N.D. Ohio 1980). Respondent's cause of action, if any, arose subsequent to April 1, 1976.

benefits authorized by Title V of the Rail Act, 45 U.S.C. §771-780, prior to its repeal by the N.E. Rail Service Act of 1981, 45 U.S.C. §1101 et seq., and currently by Title VII of the Rail Act, 45 U.S.C. §7979, as amended.

Conrail filed a Motion for Summary Judgment on September 10, 1981, on the ground that LeStrange lacked standing to raise a claim for violation of Section 504. On October 20, 1981, Judge Rambo granted Conrail's Motion for Summary Judgment, holding that LeStrange could not demonstrate standing to sue under Section 504 because (1) Conrail did not receive federal funding with a primary objective of providing employment; (2) LeStrange was not an intended beneficiary of the Federal financial assistance to Conrail; and (3) any alleged discrimination in the failure to employ LeStrange did not cause discrimination against the primary beneficiaries of federal aid.

LeStrange appealed Judge Rambo's decision to the United States Court of Appeals for the Third Circuit. In an Opinion by the Honorable Alan Bloch of the United States District Court for the Western District of Pennsylvania sitting by designation, to which the Honorable Arlin M. Adams and the Honorable Joseph F. Weis filed separate concurring Opinions, the court reversed Judge Rambo's decision and remanded the case for further consideration and disposition on the merits. The court concluded that Section 504 prohibited employment discrimination on the basis of handicap by federal grantees, regardless of the nature, purpose and intended beneficiaries of the Federal financial assistance, and that such a prohibition could be enforced by means of a private cause of action.

REASONS FOR GRANTING THE WRIT

A. Introduction.

This case involves issues of substantial public importance over which the Court of Appeals for the Third Circuit is in direct conflict with the Courts of Appeals for the Second, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits: whether all federal grantees may be subject to employment discrimination actions under Section 504 of the Rehabilitation Act without regard to the nature, purpose, beneficiaries or scope of the Federal financial assistance. If the decision in the Court of Appeals below is permitted to stand, Conrail respectfully submits that an entirely new class of litigants will be created, despite the express intent of Congress to the contrary.

In finding that Section 504 permitted private employment discrimination claims against all federal grantees, the Court of Appeals below misapplied the holding of this Court in *North Haven Board of Education v. Bell*, ____ U.S. ____, 72 L.Ed.2d 299 (1982), and misconstrued the express statutory language and legislative history of the Rehabilitation Act of 1973, the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq*. Despite Congress' incorporation of all the "remedies, procedures and rights" of Title VI into Section 504 by the 1978 Amendments, the Court of Appeals below incorporated the general enforcement provisions of Title VI into Section 504, but deleted the critical limitation upon those provisions, thereby greatly expanding the scope of the Act beyond that contemplated by Congress.

In addition, the Opinion of the Court of Appeals below failed to limit the remedy provided by Section 504 to beneficiaries of the Federal financial assistance. By neglecting to require a nexus between the allegedly discrim-

inatory failure to hire LeStrange and a specific Conrail program supported by federal funding, the Court of Appeals below also ignored the clear mandate of the Rehabilitation Act and of this Court, in *North Haven Board of Education v. Bell, supra*.

Alternatively, while this issue was not directly addressed below, the Court recently questioned whether an implied private cause of action exists under Title VI. *Guardians Association v. Civil Service Commission of the City of New York*, No. 81-431 (U.S., argued Nov. 1, 1982). In light of this Court's comments, Conrail requests that the parties be permitted to brief and argue whether an implied cause of action exists under Section 504.

Accordingly, this Court should review the decision of the Third Circuit and, upon review, reverse that decision.

B. The Third Circuit's Decision That the Purpose of Federal Assistance Is Irrelevant in Determining tl. Applicability of Section 504 of the Rehabilitation Act Conflicts With Decisions of the Courts of Appeals for the Second, Fourth, Eighth and Ninth Circuits.

In *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), the Court of Appeals for the Fourth Circuit held that an employment discrimination action under Section 504 may not be maintained unless a primary objective of the Federal financial assistance is to provide employment. *Id.* at 89. The court based this decision upon the following analysis: While Section 504 generally prohibits "discrimination under any program or activity receiving Federal financial assistance," the Rehabilitation Act of 1973 contains no specific enforcement provision for Section 504. Congress therefore provided, in Section 505 of the 1978 amendments to the Rehabilitation Act, 29 U.S.C. §794a, that "the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964

shall be available to any person aggrieved. . . ." under Section 504. In addition to Section 601 of Title VI, 42 U.S.C. §2000d ("Section 601"), which prohibits discrimination on the ground of race, color or national origin in language similar to that of Section 504, Title VI contains, in Section 604, a limitation upon the rights provided therein:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. §2000d-3 ("Section 604"). Accordingly, the "remedies, procedures and rights" of Title VI included a specific substantive limitation upon employment discrimination actions. Because all of the "remedies, procedures and rights" of Title VI had been incorporated into Section 504 by the 1978 Amendments, the *Trageser* court held that the restriction upon actions under Title VI contained in Section 604 must also be applied to actions brought under Section 504. As a result, an action under Section 504 could not be brought unless a primary objective of the Federal financial assistance was to provide employment.

The above-described analysis has been adopted by three other Courts of Appeals. The United States Court of Appeals for the Eighth Circuit in *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980), in adopting the *Trageser* interpretation of Section 504, noted that while the limitation contained in Section 604 of Title VI literally applied to only agency enforcement, the legislative history of Title VI conclusively demonstrated that Congress intended the following general limitation: Title VI protection extended only to the intended beneficiaries of Federal financial assistance.

Thus, in order to prevail in an employment discrimination action under Section 504, the Plaintiff must show that the purpose of the federal aid was to provide employment.[4]

The United States Court of Appeals for the Second Circuit, in *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981) referred to the decision of the Fourth Circuit in *Trageser* and the decision of the Eighth Circuit in *Carmi* in finding that no employment discrimination cause of action on account of handicap under Section 504 existed unless the primary purpose of federal funding was to provide employment. The analysis of the courts described above was also expressly adopted by the United States Court of Appeals for the Ninth Circuit in *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982).[5]

In the instant case, the Court of Appeals below erroneously rejected the *Trageser-Carmi-Cabrini Medical Center-Scanlon* analysis. The court founded its decision, in part, upon the holding of this Court in *North Haven Board of Education v. Bell, supra*, which the Third Circuit stated ". . . dictates our approach in this case." 687 F.2d at 769. In *North Haven*, the Court found that the employment practices of educational institutions may be challenged under Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 ("Section 901"), regardless of the nature or purpose of the Federal

---

4. The Eighth Circuit has reaffirmed its holding in *Carmi* in two subsequent cases, *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982); *Simon v. St. Louis County, Missouri*, 656 F.2d 316 (8th Cir. 1981).

5. Shortly prior to the decision of the Third Circuit in the instant case, the United States Court of Appeals for the Eleventh Circuit, in *Jones v. Metropolitan Atlanta Rapid Transit Authority*, No. 81-7746 (11th Cir. Aug. 6, 1982) held that Section 604 did not apply to actions under the Rehabilitation Act, and therefore a plaintiff need not demonstrate that a primary purpose of the Federal funding was to provide employment.

financial assistance.[6] Because the wording of Section 504 of the Rehabilitation Act is similar to Section 901 of the Education Amendments, the Court of Appeals below adopted a presumption that the same result was required in the instant case. Moreover, Judge Adams, in his concurring opinion, concluded that the analysis of *North Haven* ". . . appear[ed] to compel . . ." a finding that the employment practices of all federal grantees may be challenged under Section 504, regardless of the nature or purpose of the Federal financial assistance. 687 F.2d at 777.

Contrary to the Court of Appeals' decision, the Court's opinion in *North Haven* cannot fairly be applied outside the context of Title IX. Indeed, *North Haven* explicitly distinguished between Title IX and Title VI on the basis of the limitation contained in Section 604:

> If Congress had intended that Title IX have the same reach as Title VI, therefore, we assume that it would have enacted counterparts to both §601 and §604. For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them.

72 L.Ed. 2d at 313-14. As noted above, the Rehabilitation Act, as amended, has incorporated the "remedies, procedures and rights" of Title VI into Section 504. This Court's implicit recognition of a limitation upon the scope of Title VI in *North Haven* therefore would apply equally to actions brought under Section 504. Accordingly, the Court of Appeals' reliance upon this Court's decision in *North Haven* is misplaced.

The erroneous application of *North Haven* to the instant case by the Court of Appeals below is highly sig-

---

6. Section 901 provides that:

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

nificant, for *North Haven* was used as the basis for effectively overruling a settled line of cases established by four other Courts of Appeals. Thus, *North Haven* has served as an unintended catalyst for a finding that the purposes of Federal financial assistance are irrelevant to the applicability of Section 504, notwithstanding this Court's express limitation of its holding in *North Haven* to Title IX, and the contrary findings of the Courts of Appeals in *Trageser*, *Carmi*, *Cabrini Medical Center* and *Scanlon*.

This unwarranted extension of *North Haven* will have a dramatic effect upon the volume of federal Rehabilitation Act litigation. The prior settled law, as found by four Courts of Appeals, had expressly limited the employment discrimination implied cause of action to those handicapped individuals alleging discrimination in federally funded programs established to provide employment. Under the reasoning of the Court of Appeals below, however, every handicapped employee or applicant for employment may maintain an action against the employer simply by showing the receipt of Federal financial assistance, for any purpose. Such a result is not consistent with the holding of this Court in *North Haven*, and is contrary to both the intent of Congress, as expressed in the specific provisions of the Rehabilitation Act, as amended, and the decisions of the four Courts of Appeals discussed above. In addition, it is likely to increase the amount of litigation relating to private employers who receive any Federal financial assistance.

After reviewing the decision of this Court in *North Haven*, the Court of Appeals below examined the statutory provisions at issue and concluded, contrary to four other Courts of Appeals that have decided the precise issue, that Section 505(a)(2) of the 1978 amendments to the Rehabilitation Act did not incorporate Section 604 of Title VI into Section 504 of the Rehabilitation Act. 687 F.2d at 770. The court based its conclusion upon the language of Section 604, which is limited to depart-

ments or agencies, rather than to persons. Indeed, the court stated that "the question of whether Section 604 also limited the rights of private litigants was unlikely to even occur to the Congress." 687 F.2d at 771.[7] This interpretation of the statutes is clearly erroneous.

Neither Title VI nor Section 504 expressly provide for private actions to redress perceived discrimination. Compliance with Title VI was to be effected by the termination of federal funding pursuant to Section 602, 42 U.S.C. §2000d-1, while Section 504 contained no enforcement provisions. Therefore, the lack of any reference to "persons" in Section 604 is simply due to the lack of any express cause of action for "persons", as acknowledged by the Court of Appeals below. Assuming, *arguendo*, that a private right of action may be implied under Title VI and Section 504, the same limitation applicable to agencies logically would also apply to individuals who bring suit under these provisions. Conversely, it is not logical to assume that Congress intended the same non-discrimination provision to create a panoply of implied individual rights *beyond* those which may be effectuated by agency action. It is similarly illogical to assume that Congress, in incorporating the "remedies, procedures and rights" of Title VI into Section 504, in-

---

7. Under this reasoning, the Court of Appeals below would clearly find that the restriction contained in Section 604 would not apply to private litigants under Title VI, as well as Section 504. The Department of Health and Human Services has not adopted this extreme position, for the applicable regulations generally require that the employment practices of a federal grantee may only be challenged under Title VI where a primary objective of the Federal financial assistance is to provide employment. 45 C.F.R. 80.3(c).

The only exception to this rule prohibits employment discrimination which would result in discriminatory treatment of beneficiaries of any program supported by federal funding. 45 C.F.R. 80.3(c)(3). The District Court in the instant case expressly found that this exception could not apply herein, for discrimination against LeStrange did not cause any discrimination against the beneficiaries of the Federal financial assistance. Slip op. at 23-24.

tended to delete the significant limitation upon those rights and remedies established by Section 604 either with respect to agency action or private causes of action. This Court has stated that ". . . where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet." *Arnett v. Kennedy*, 416 U.S. 134, 153-4 (1974). Had Congress intended to delete Section 604 from the application of Title VI to Section 504, it expressly could have done so in Section 505(a)(2) of the 1978 Amendments.[8]

Based upon the reasons set forth above, the Court should grant the instant Petition for a Writ of Certiorari in order to resolve the direct conflict among the Courts of Appeals on an issue of substantial public importance. The Court of Appeals below has held, in direct conflict with four other Courts of Appeals, that the purpose of Federal financial assistance is irrelevant to the applicability of Section 504. In so holding, the Court of Appeals below erroneously relied upon *North Haven*, in which this Court construed a materially different statute from that at issue here. If allowed to stand, the decision of the Court of Appeals will permit a plethora of private employment discrimination actions against all federal grantees, without restriction as to the nature of the fed-

8. Similarly, the Court of Appeals below rejected Conrail's argument that Congress' extension of the rights, remedies and procedures of Title VI to Section 504, while extending the rights, remedies and procedures of Title VII, 42 U.S.C. §2000e *et seq*, to Section 501 of the Rehabilitation Act, 29 U.S.C. §791, which requires affirmative action plans by federal agencies, demonstrated that employment discrimination actions would be severely limited under Section 504. Despite the Third Circuit's finding that the procedures of Title VII could not have been applied to all actions under Section 504 because the EEOC lacked expertise in non-employment related areas, presumably Congress could have extended the Title VII procedures to employment discrimination actions under Section 504, if it had so intended.

eral funding. This would produce the anomalous result of providing private litigants with greater enforcement rights than the federal agencies, who are charged with the responsibility of enforcing both Title VI and Section 504. This result could not have been intended by Congress nor by this Court and therefore, the Court should grant the Petition for a Writ of Certiorari upon this question.

C. The Third Circuit's Decision, Which Failed To Require a Nexus Between a Specific Program Supported by Federal Financial Assistance and the Denial of Employment to LeStrange, Is in Direct Conflict With the Decision of This Court in *North Haven*, As Well As the Decisions of Other Courts of Appeals.

Assuming, *arguendo*, that LeStrange may bring an action under Section 504 without demonstrating that the primary purpose of the Federal financial assistance to Conrail is to provide employment, the Court of Appeals nonetheless erred in failing to require any connection between LeStrange's claim of discrimination and a specific program of Conrail supported by Federal financial assistance. The decision of the Court of Appeals permitted the instant action to go forward based solely upon the LeStrange's claim that he was denied a position because of his handicap and that Conrail received Federal financial assistance. Conrail respectfully submits that the Court of Appeals' failure to consider whether LeStrange was discriminated against as a participant or beneficiary of a specific program supported by federal funding is in derogation of the "program-specific" mandate of Section 504, and therefore is in conflict with the holding of this Court in *North Haven Board of Education v. Bell, supra*, as well as the decisions of the Courts of Appeals for the Fifth, Seventh and Eleventh Circuits.

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap ". . . under any pro-

gram or activity receiving Federal financial assistance." As shown above, the quoted language is identical to that utilized in Section 901 of Title IX regarding sex discrimination in educational institutions, and Section 601 of Title VI regarding discrimination on the basis of race, color or national origin by federal grantees. Although this Court in *North Haven* upheld the HEW regulations prohibiting employment discrimination on the basis of sex, the case was remanded because ". . . the Court of Appeals paid insufficient attention to the 'program specific' nature of the statute." 72 L. Ed.2d at 317. This decision was based largely upon the language of Section 902 of Title IX, 20 U.S.C. §1682, which limits the agency's power to terminate funds to ". . . the particular program or part thereof, in which . . . noncompliance has been found," and authorizes the agency to implement regulations only ". . . with respect to such program or activity . . ." This Court specifically stated:

> Certainly, it makes little sense to interpret the statute, as respondents urge, to authorize an agency to promulgate rules that it cannot enforce. And §901(a) itself has a similar program-specific focus: it forbids gender discrimination 'under any education program or activity receiving Federal financial assistance . . . .'

72 L. Ed.2d at 318.

Anomalously, the Court of Appeals below ignored this Court's express admonition as to the "program-specific" nature of Title IX in its analysis of Title VI and Section 504. By its very language, Section 504, like Section 901(a), has a program-specific focus. In addition, as noted above, the "remedies, procedures and rights" of Title VI have been incorporated into Section 504 by the 1978 amendments to the Rehabilitation Act. Section 602 of Title VI, 42 U.S.C. §2000d-1, is virtually identical to Section 902 of Title IX, for it also limits the agency's power to terminate funds to ". . . the particular

program, or part thereof, in which such noncompliance has been found," and it also authorizes the agency to implement regulations only ". . . with respect to such program or activity." Thus, the "program-specific" nature of Title IX is mirrored by the "program-specific" nature of Title VI, which must also be applied, by reason of the 1978 amendments, to Section 504. The Court of Appeals below failed to consider this requirement and therefore its decision, under the dictates of *North Haven*, should be reviewed.[9]

Furthermore, the decision of the Court of Appeals is in direct conflict with the decisions of other Courts of Appeals that have required such a nexus in the context of a complaint brought under Section 504.

Based upon the language of Section 504, the United States Court of Appeals for the Seventh Circuit has found that:

> The statute does not, as plaintiff seems to contend, generally forbid discrimination against the handicapped by recipients of federal assistance. Instead, its terms apparently require that the discrimination

---

9. Although inconsistent with the decision of this Court in *North Haven*, the decision of the Court of Appeals below is consistent with the prior Third Circuit decision of *Grove City College v. Bell*, 687 F.2d 684 (3d Cir.), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Nov. 9, 1982) (No. 82-792). In that case, the court held that an entire educational institution may be considered a "single program" and subject to regulation under Title IX, if it receives any federal aid, and that aid is not specifically earmarked for a particular educational function within the institution. By adopting such a broad definition of "program", the Third Circuit has effectively eviscerated the requirement that enforcement activity under Title IX be "program-specific." Due to the similarity between Section 901 of Title IX and Section 504, the Court of Appeals below implicitly found it could also ignore the "program-specific" provisions of Section 504, based upon *Grove City*. Indeed, the concurring opinion by Judge Adams expressly recognized that *Grove City*, in conjunction with *North Haven*, were ". . . consonant with, and perhaps even compelled . . ." the decision of the Third Circuit in the instant case. 687 F.2d at 777.

> must have some direct or indirect effect on the handicapped persons in the program or activity receiving federal financial assistance. To be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminution of the benefits he would otherwise receive from the program.

Simpson v. Reynolds Metals Company, Inc., 629 F.2d 1226, 1232 (7th Cir. 1980). This conclusion is bolstered by the legislative history of Title VI which, as shown above, must be read *in pari materia* with Section 504, especially in light of Section 505(a)(2) of the 1978 amendments to the Rehabilitation Act. As noted by the Seventh Circuit, this legislative history demonstrates that Congress only intended to extend Title VI protection to the participants and beneficiaries of the Federal financial assistance.[10] The court also referred to several excerpts in the legislative history of Section 504 which supported the program-specific nature of the Rehabilitation Act.[11] Because the plaintiff in *Simpson* could not demonstrate any nexus between his discharge by reason of his handicap and the federally assisted program, the court affirmed the dismissal of his Section 504 claim.

The identical analysis has been utilized by the United States Court of Appeals for the Fifth Circuit in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981). After re-

---

10. For example, during the legislative discussion over Title VI, Representative Celler stated:

> As to each assisted program or activity, Title VI will require an identification of those persons whom Congress recorded as participants and beneficiaries and in respect to whom the principle declared in Title VI would apply.

110 Cong. Rec. 1521 (1964).

11. For example, the Senate Report on Section 504 notes:

> The Committee Bill . . . prohibits discrimination against qualified handicapped individuals *under Federal grants*. S. Rep. No. 318, 93d Cong., 1st Sess. 18, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2091 (emphasis supplied).

viewing the relevant statutory provisions and legislative history, the Fifth Circuit there announced that:

> . . . [I]t is not sufficient, for purposes of bringing a discrimination claim under section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has received some form of input from the federal fisc. A private plaintiff in a section 504 case must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance.

650 F.2d at 769 (footnotes omitted). This holding has been reaffirmed by the new Court of Appeals for the Eleventh Circuit in *Doyle v. University of Alabama*, No. 81-7697 (11th Cir. July 19, 1982).[12]

The failure of the Court of Appeals below to require that LeStrange demonstrate that he suffered discrimination in the context of a specific federally funded program also stands in sharp contrast to the recent decision of the United States District Court for the Eastern District of Virginia in *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982). In that case, the court held that the mere receipt of Federal financial assistance by a university did not constitute a sufficient basis for an agency investigation under Title IX into allegations of discriminatory treatment within its athletic program, which received no direct funding. The Civil Rights Division of the Justice Department recently announced that it would not appeal this decision, for it found the decision

12. In an analogous case, the United States Court of Appeals for the First Circuit has held that an individual who could not identify a specific federally funded program under which she suffered discrimination because of her sex could not maintain a Title IX cause of action merely by showing the receipt of federal funds by a law school. *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981). This decision, like *Simpson* and *Brown*, cannot be reconciled with *Grove City*, upon which the decision of the court below rests.

". . . to be both analytically and legally sound . . ." The Washington Post, October 11, 1982, at A17.[13] Thus, the decisions of the Third Circuit in the instant case and in *Grove City* directly conflict with a decision of this Court, the decisions of other Courts of Appeals, and the position of the agency charged with the primary statutory responsibility of enforcing Title IX, Title VI and Section 504. Indeed, the employer in *Grove City* has filed a Petition for a Writ of Certiorari with the Court. The petition raises issues under Title IX that are analogous to those raised herein. The Petition for a Writ of Certiorari on this question should therefore be granted.

D. The Third Circuit's Decision Erroneously Assumed, Without Discussion, That a Private Right of Action May Be Implied Under Section 504 of the Rehabilitation Act.

Petitioner did not argue below that no private cause of action may be implied under Section 504, because the law in the Third Circuit and other circuits on this question appeared to be well settled.[14] Moreover, while this Court specifically declined to decide the question of

13. The initial announcement by the Justice Department of the decision not to appeal *University of Richmond* was reported in The Washington Post on September 9, 1982, at A23. The period for filing a timely appeal of the court's decision, which was filed on July 8, 1982, expired on September 7, 1982, pursuant to Rule 4 of the Federal Rules of Appellate Procedure. The docket of the District Court for the Eastern District of Virginia reflects that the case has not been appealed.

14. The Third Circuit has expressly found that a private cause of action may be implied under both Title VI and Section 504 in *National Association for the Advancement of Colored People v. The Medical Center Inc.*, 599 F.2d 1247 (3d Cir. 1979). This decision was in accord with the earlier holdings of the Seventh Circuit in *Lloyd v. Regional Transport Authority*, 548 F.2d 1277 (7th Cir. 1977) (implied cause of action under both Title VI and Section 504) and the Fifth Circuit in *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) (implied cause of action under Title VI).

whether a private right of action existed under Section 504 in *Southeastern Community College v. Davis*, 442 U.S. 397, 404-5 n.5 (1979), the decision of this Court in *Cannon v. University of Chicago* 441 U.S. 677 (1979), in which a private right of action was implied under Title IX in large part because of a Congressional understanding that such a right existed under Title VI, appeared to foreclose the issue.

In a recent oral argument before this Court, however, in *Guardians Association v. Civil Service Commission of the City of New York, supra*, several Justices expressed concern over the necessity of deciding whether a private cause of action exists under Title VI. That case involved the propriety of federal regulations under Title VI which permitted the termination of funds based upon the effects of discriminatory practices, rather than upon their intent. While the issue was not raised nor argued below, Mr. Justice Powell questioned counsel for the petitioner whether the lawsuit could proceed unless a private cause of action was found to exist. In answer to counsel's statement that ". . . I don't think that there would be [a lawsuit] if there were no private cause of action," Mr. Justice Powell stated, "which would suggest that we do have to decide that issue. I don't know . . . ." Mr. Justice White then remarked that ". . . certainly we wouldn't be precluded from deciding it. . . ." (Transcript of Oral Argument, November 1, 1982, at 36).

The concern expressed by this Court during the oral argument discussed above demonstrates that the existence of an implied cause of action under Title VI is still in doubt. Although this Court's decision in *Cannon* has been interpreted to demonstrate the viability of such a cause of action, *N.A.A.C.P. v. The Medical Center, Inc.*, 599 F.2d at 1257, that decision only found that Congress, in framing Title IX in 1972, believed a private right of action existed under Title VI, rather than finding that a private Title VI right did in fact exist. *Cannon v. University of Chicago*, 441 U.S. at 703. Similarly, the

plurality opinion of this Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) merely assumed, for purposes of that case, that a private cause of action under Title VI existed. *Id.* at 283-84. Justice White, however, filed a separate opinion, in which he specifically dissented from that assumption on the basis that Congress did not intend to create such a right in 1964. *Id.* at 380-87.

This Court may exercise its discretion to consider issues not raised in the courts below where the determination of such an issue constitutes "plain error" in an "exceptional case". *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947); SUPREME COURT PRACTICE, STERN & GRESSMAN §6.27, 458-461 (5th Ed. 1978). The question of the existence of an implied right of action under Title VI and, by reason of the 1978 Amendments, under Section 504, is fundamental to the instant case as well as to a broad range of cases currently being litigated under these statutes. Accordingly, should the Court decide that this issue remains open and must be decided, Conrail respectfully requests that the parties be permitted to bring the issue before the Court. If permitted to do so, Conrail would demonstrate that Congress did not intend to create a private right of action under Title VI and that, consequently, no such right exists under Section 504. On this basis, this Court should grant the instant petition and upon review, reverse the decision of the Third Circuit below.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

HARRY A. RISSETTO
1800 M. Street, N.W.
Washington, DC

DENNIS J. MORIKAWA
KENNETH D. KLEINMAN
2100 Fidelity Building
Philadelphia, PA 19109

DENNIS ALAN AROUCA
1138 Six Penn Center
Philadelphia, PA 19103

Of Counsel:

MORGAN, LEWIS & BOCKIUS

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2943

THOMAS LE STRANGE,
Appellant

v.

CONSOLIDATED RAIL CORPORATION,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. No. 78-0944)

Submitted June 8, 1982

Before: ADAMS and WEIS, *Circuit Judges*
and BLOCH*, *District Judge*

---

* The Honorable Alan Bloch, United States District Judge for the Western District of Pennsylvania, sitting by designation.

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

BLOCH, *District Judge*.

Plaintiff brought suit, pursuant to §504 of the Rehabilitation Act of 1973, claiming he was denied employment by the defendant because he is handicapped. Section 504, 29 U.S.C. §794, provides: "No otherwise qualified handicapped individual . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." Although the lower court dismissed plaintiff's action because he lacked standing to bring his suit, we think the question posed by this appeal is, in fact, whether §504's prohibition against discrimination by federal grantees encompasses a ban against employment discrimination.

I

The lower court concluded plaintiff did not have standing to sue defendant for employment discrimination "unless 1) providing employment is a primary objective of the federal aid received by the defendant, or 2) discrimination in employment necessarily causes discrimination against primary beneficiaries of the federal aid." *LeStrange v. Consolidated Rail Corp.*, No. 78-0944 (M.D. Pa. Oct. 20, 1981). The court further refined the first prong of its standing test to require the plaintiff to show he is a primary beneficiary of the federal aid received by the defendant, and that the primary objective of the federal aid be to create new jobs, and not merely to maintain employment or to compensate for lost jobs. Plaintiff could not meet either of the two prongs of the lower court's standing test.

This standing test had its genesis in the case of *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d

87 (4th Cir. 1978). The *Trageser* analysis has since been adopted by the Eighth Circuit in *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (1980), the Second Circuit in *United States v. Cabrini Medical Center*, 639 F.2d 908 (1981), and the Ninth Circuit in *Scanlon v. Atascadero State Hospital*, No. 80-5201 (May 24, 1982). *Trageser* and its progeny rely on §505(a)(2) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, amending the Rehabilitation Act of 1973, which provides:

> "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such. . . ."

29 U.S.C. §794a(a)(2).

Title VI served as the model for §504 of the Rehabilitation Act. Section 601 of Title VI provides:

> "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. §2000d.

Section 602 of Title VI authorizes federal departments and agencies to promulgate regulations to enforce §601's prohibition against discrimination, including regulations providing for the termination of federal funding in the event of non-compliance. *id.*, §2000d-1. However, §604 provides:

> "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment."

Id., §2000d-3.

Trageser concludes, first, that §604 limits not only agency action, but also the actions of private litigants. It then concludes that the remedies, procedures and rights of Title VI extended to the victims of handicap discrimination by the 1978 amendments to the Rehabilitation Act includes §604's limitation on the right to bring an action for employment discrimination.

The lower court reformulated the *Trageser* holding into a test for standing, peculiar to §504 actions. We see no reason to formulate any test for standing for §504 actions other than that promulgated by the Supreme Court for general application, that is (a) does the plaintiff allege "that the challenged action has caused him injury in fact, economic or otherwise"; and (b) "[is] the interest sought to be protected by the complainant . . . arguably within the zone of interests [sought] to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 152-53 (1970). The relevant question on this appeal would then be whether plaintiff's interest in being free from employment discrimination falls within the zone of interests sought to be protected by §504. However, the correct formulation of the test for standing for §504 actions is not the crucial issue presented by this appeal. For however the test is formulated, the crucial issue is whether §504, as amended in 1978, covers employment discrimination against the handicapped by federal grantees.

II

The Supreme Court recently confronted this same issue within the context of Title IX of the Education Amendments of 1972, and we believe its approach in *North Haven Board of Education v. Bell*, 50 U.S.L.W. 4501 (May 17, 1982), dictates our approach in this case.

Section 901(a) of Title IX, like §504 of the Rehabili-

tation Act, is modeled after §601 of Title VI of the Civil Rights Act. It provides:

> "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

The Department of Education promulgated regulations pursuant to Title IX, prohibiting federally funded education programs from discriminating in employment on the basis of gender. Two Connecticut public school boards brought separate suits challenging its authority to issue the regulations, arguing Title IX was not meant to reach the employment practices of educational institutions.

The Supreme Court began its analysis by focusing on the statutory language, concluding first that "[A] female employee who works in a federally funded education program is 'subjected to discrimination under' that program if she is paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are her male colleagues." *id.* at 4503, and, therefore, that, "Because §901(a) neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these 'persons' unless other considerations counsel to the contrary," *id.* To determine whether "other considerations counsel to the contrary," the Supreme Court looked to the legislative history "for evidence as to whether Congress meant somehow to limit the expansive language of §901," *id.* The Court found no such evidence and held, "Title IX proscribes employment discrimination in federally funded education programs," *id.* at 4507.

III

The statutory language of §504 of the Rehabilitation Act and §901 of Title IX being virtually identical, we are bound to conclude, like the Supreme Court in *North Haven*, that because §504 "neither expressly nor impliedly excludes employees from its reach, we should interpret the provisions as covering and protecting these 'persons' unless other considerations counsel to the contrary." For like female employees, handicapped employees are "subjected to discrimination under" a federally funded program if they are paid lower salaries, given less opportunity for promotion, or forced to work under more adverse conditions than are their non-handicapped colleagues. Similarly, a handicapped individual is certainly "subjected to discrimination under" a federally funded program if, as alleged in our case, he is not hired at all, solely because of his handicap.

Of course, *Trageser* and the courts which have followed it, including the lower court in this case, find counsel to the contrary in §505(a)(2) of the 1978 amendments to the Rehabilitation Act, extending the remedies, procedures and rights of Title VI to victims of handicap discrimination. Title IX contains no provision similar to §505(a)(2). *Trageser* would also argue that §505(a)(2) should be read together with §505(a)(1), 29 U.S.C. §794a(a)(1), extending the remedies, procedures and rights of Title VII to victims of handicap discrimination by the federal government. The failure of Congress to extend Title VII to victims of discrimination by federal grantees indicates to the *Trageser* court its intention to limit the scope of §504 to discrimination other than employment discrimination. We do not believe that the statutory language of §505(a)(2), even when read in the context of §505(a)(1), indicates a desire to narrow the scope of §504. For this reason, we would nonetheless find §504 prohibits employment discrimination by federal grantees unless anything in the legislative history of either §504 or §505(a)(2) counsels to the contrary.

Section 505(a)(2) extends the remedies, rights and procedures of Title VI to (1) persons; (2) aggrieved by any act or failure to act by either a recipient or a provider of federal funds. Title VI consists of six provisions,[1] and the only one which extends to *persons* any rights or remedies is §603, 42 U.S.C. §2000d-2, providing for judicial review of agency action.

The plain words of §604 limit its application to departments or agencies. Given the statutory scheme of which Title VI is a part, it is not illogical to assume Congress intended precisely what it said and no more. Title VI is, of course, a part of the 1964 Civil Rights Act. The 1964 Civil Rights Act also has a Title VII which deals exclusively with employment discrimination. In 1964, it prohibited employment discrimination on the basis of race, color or national origin by *any* employer with 15 or more employees working each working day for at least 20 weeks. Obviously, the sweep of Title VII is far broader than Title VI. Clearly, Title VI was never meant to be a prime tool for the enforcement of employment rights.

Title VII created a new federal agency, the Equal Employment Opportunity Commission, to battle employment discrimination. Without the limiting language

---

1. The first provision of Title VI, §601, 42 U.S.C. §2000-d, is the declaration prohibiting discrimination on the basis of race, color or national origin by federal grantees. The second provision, §602, *id.* §2000d-1, authorizes federal departments and agencies to issue rules, regulations and orders to effectuate the initial prohibition against discrimination. Section 602 also provides that compliance with the regulations may be effected by the termination of federal funding. It further provides for a number of procedures clearly designed, not to protect the victim of discrimination, but the federal grantee. Section 603, *id.* §2000d-2, provides for judicial review of agency action. Section 604, id. 2000d-3, prohibits any department or agency from terminating funds for employment discrimination unless a primary goal of the federal program involved is to provide employment. Section 605, *id.* §2000d-4, exempts from the scope of Title VI programs which receive federal financial assistance by way of a contract of insurance or guaranty.

of §604, Title VI threatened to engage every other department and agency in the same battle, with the potential danger of varying rules, regulations and strategies.

The question of whether §604 also limited the rights of private litigants was unlikely to even occur to the Congress. The only reason for a private litigant to sue for employment discrimination under Title VI is that he failed to meet the administrative requirements to bringing suit under Title VII. Even then, an action brought pursuant to 42 U.S.C. §1983 may provide a wider range of remedies than a Title VI action.[2]

As to the implications raised by §505(a)(1), extending the remedies, procedures and rights of Title VII to victims of discrimination by the federal government, closer analysis undermines the *Trageser* argument that this too indicates Congressional intent to limit §504 to discrimination other than employment discrimination.

Section 505(a)(1) extends particular provisions of Title VII to individuals aggrieved by the final disposition of a complaint brought pursuant to §501 of the Rehabilitation Act. Section 501 requires federal departments, agencies and instrumentalities, including the Postal Service, to develop an affirmative action plan for the hiring, placement and advancement of handicapped individuals. Handicapped employees or prospective employees aggrieved by agency action or inaction may file a complaint with the agency. The particular provisions of Title VII referred to in §505(a)(1) extend to complaining individuals the right to appeal an adverse agency decision to the EEOC and then to bring a civil action in court. The various provisions prescribe various time limitations on agency action and the filing of appeals and civil suits. They further proscribe various court procedures.

---

2. Some courts have decided that a Title VI litigant is entitled to declaratory and injunctive relief only, and not monetary damages. *Drayden v. Needville Independent School Dist.*, 642 F.2d 129 (5th Cir. 1981); *Concerned Tenants Ass'n. v. Indian Trails Apartments*, 496 F. Supp. 522 (N.D. Ill. 1980).

Section 505(a)(1) refers alleged victims of employment discrimination on the basis of handicap in the federal government to the very sections of Title VII dealing with employment discrimination on the basis of race, color, religion, sex or national origin in the federal government. Section 505(a)(1) asks the EEOC to do what it is already doing for victims of employment discrimination on one basis for victims of employment discrimination on another basis. The question before the EEOC in either case is the same: was this person discriminated against in the making of some employment decision? Once the EEOC has made its determination, the alleged discriminatee, if dissatisfied, may go to court.

In contrast, extending Title VII rights, remedies and procedures to victims of discrimination by federal grantees would present a host of new issues to the EEOC. First, it would take it beyond the realm of employment discrimination for the first time, to discrimination in housing, access, education, etc. Second, it would ask it to resolve the issue of what is a federally-funded program or activity, a question with which it has no familiarity.

The failure of Congress to extend Title VII to victims of §504 discrimination was obviously intended simply to short-circuit the EEOC, and for obvious reasons. Reading into the statutory framework of §505 an intention to drastically narrow the scope of §504 is a strained interpretation of an otherwise reasonably constructed provision. Support should be found in the legislative history before we should stretch so far.

IV

In order to be certain that Congress intended what the broad sweep of its language in §504 indicates, we must undertake a two-step analysis of legislative history. Section 504 should be read to prohibit employment discrimination "unless other considerations counsel to the

contrary." Considerations counselling to the contrary may be found in the legislative history of §504 of the Rehabilitation Act of 1973 or the legislative history of the 1978 amendments, which introduced §505(a)(2) to the Act. We begin with the 1973 legislative history. Because we believe nothing in that history indicates Congress intended anything less than it said, we then turn to the history of the 1978 amendments to determine if Congress, at that point, intended to narrow the scope of its prior enactment.

A

The legislation which would eventually become the Rehabilitation Act of 1973 was considered and passed by the Congress three times before it was finally signed into law by President Nixon on September 26, 1973. Sen. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted* in 1973 U.S. Code Cong. & Ad. News 2076, 2086-2090 [hereinafter cited at Sen. Rep. No. 93-318]. A provision prohibiting discrimination against the handicapped by federal grantees was part of all three measures, *id.* at 2078-2082, although it was not part of the original resolution passed in 1972 by the House. Comm. of Conf. Rep. H.R. 8395, 92d Cong., 2d Sess., *reprinted in* 118 Cong. Rec. 35141, 35163.

All versions of the legislation were lengthy, the first two even lengthier than the third. Certainly, the primary purpose of the legislation was to extend the 53-year-old vocational rehabilitation program, for another period of years, with a new mandate, in the original two bills, to give priority to the severely handicapped. In addition, the bills as originally submitted to the President authorized a program which, for the first time, would have provided rehabilitation services to severely handicapped individuals with no feasible vocational goals. In addition, the original two bills would have created a series of other new programs concentrating on particular sub-groups of

the handicapped, such as older deaf and blind individuals with spinal cord injuries and individuals with end-stage renal disease. Finally, the bills would have mandated certain research and created a number of federal bodies to deal with particular problems of the handicapped. Sen. Rep. No. 93-318, 1973 U.S. Code Cong. & Ad. News at 2078-2079.

The first bill was pocket vetoed by the President on October 27, 1972. 118 Cong. Rec. 37203. The second bill was vetoed on March 27, 1973, 119 Cong. Rec. 9307, and the Senate failed to override the veto a week later, *id.* at 10794. Serious negotiations between the Administration and, primarily, the Senate then began. Sen. Rep. No. 93-318, 1973 U.S. Code & Ad. News at 2082.

The President's primary objection to the original two bills was that they authorized what he considered to be an excessive and inflationary amount of money to fund the proposed programs. He also objected to what he saw as a change of focus in the highly successful vocational rehabilitation program by requiring priority be given to the severely handicapped. He also opposed the proliferation of categorical grants to fund the new programs and the proliferation of federal commissions, councils and divisions. 118 Cong. Rec. 5880 (first veto memorandum); 119 Cong. Rec. 24570 (second veto memorandum). The final bill that was to become law was trimmed from seven titles to five. It required only that vocational rehabilitation programs give equal, not priority, treatment to the severely handicapped, eliminated all the proposed new programs, including the non-vocational rehabilitation program, eliminated most of the new federal bodies which would have dealt with the problems of the handicapped, and, of course, significantly lowered the amount of money authorized to fund the remaining legislation. Sen. Rep. No. 93-318, 1973 U.S. Code Cong. & Ad. News at 2079-2082.

At no time was there any dispute between the Administration and the Congress over the wisdom of the

non-discrimination provision which would eventually be codified in §504. Neither was it ever a matter of controversy between the Senate and the House. Although it was not part of the first House resolution, the Senate version was accepted in conference with no more than the notation, "The House recedes." 118 Cong. Rec. 35163.

It is not surprising, therefore, that despite the pages of legislative history generated by an act debated and passed three times by Congress, that there is little reference to §504. There is no direct reference indicating that §504 was not meant to cover employment discrimination. However, there are several both direct and indirect references indicating the contrary.

The Rehabilitation Act was born in the Senate in the newly constituted Subcommittee on the Handicapped of the Committee on Labor and Public Welfare. The subcommittee was charged with examining *all* issues related to the handicapped, not just those raised by the vocational rehabilitation program. 119 Cong. Rec. 5882. The expanded focus of the bill which was reported by the subcommittee was certainly due, in part, to the wide focus of the subcommittee's mandate. The legislative history indicates one of the problems of the handicapped addressed by the subcommittee was the problem of employment discrimination.

Senator Cranston, who chaired the subcommittee for the purpose of considering the legislation extending the vocational rehabilitation program, commented during debate on various criticisms of the program which he felt could not be handled simply by amending the Vocational Rehabilitation Act itself. "Such problems as *unfounded discrimination in employment* and in housing, difficulties of access to places of work and treatment centers, and duplication and fragmentation of services

across program lines were voiced repeatedly to the committee," he noted. (Emphasis added). *Id.*[3]

Discrimination in employment has a particularly detrimental impact on the vocational rehabilitation program. Senator Cranston noted:

> "[D]iscrimination in placement, hiring and advancement continue to limit the vocational rehabilitation program's ability to effect successful rehabilitations . . . The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to eliminate architectural barriers and provide substantial accomplishments in employment for handicapped individuals."

Id.

These sentiments of Senator Cranston expressed during debate on the second incarnation of the act were echoed by Senator Taft during debate on the third incarnation of the act:

> The basic purpose of vocational rehabilitation continues to be to help physically and mentally handicapped individuals achieve the ability to work, earn, and live independently in their communities. Yet in spite of the relatively high success of this program, we still have a long way to go . . . Too many handicapped Americans are not served at all, too many lack jobs, and too many are underemployed — utilized in capacities well below the levels of their training, education, and ability.
>
> However, if we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program,

---

3. *See also*, the remarks of Senator Stafford, the ranking minority member of the subcommittee, 119 Cong. Rec. 5893; and Sen. Rep. No. 93-318, 93d Cong. 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2078.

> we must devote more of our energy toward the elimination of the most disgraceful barrier of all — discrimination.

Id. at 24587.

And, clearly, the Rehabilitation Act addressed the problem of employment discrimination. As described by Senator Javits, co-sponsor of the act, a member of the subcommittee and ranking minority member of the parent Committee on Labor and Public Welfare, "This measure draws upon the experience of the past half century and provides new emphasis on the severely handicapped, the homebound, client services and participation, *opportunities for employment of the handicapped* and administration improvements." (Emphasis added). *Id.* at 5887. The bill as originally reported and ultimately enacted into law provided, in sections immediately preceding §504, for affirmative action programs to encourage the hiring of the handicapped by the federal government, 29 U.S.C. §791(b) and federal contractors, 29 U.S.C. §793. It is hard to imagine, in an Act whose primary goal is to enhance the vocational capabilities of the handicapped, that if the legislature had intended to limit the reach of a provision which immediately follows two sections whose express purpose is to encourage the hiring of the handicapped, that someone somewhere in the legislative history would not have said so. On the contrary, several members indicated the opposite.

During debate on the original bill, Senator Javits highlighted several new areas of federal responsibility recognized by the legislation: "I refer, for example, to . . . provisions for encouraging hiring of the handicapped under Federal contracts and Federal grants." 118 Cong. Rec. 32305. Senator Humphrey reviewed those provisions requiring affirmative action by federal contractors and prohibiting discrimination by federal grantees and found they embodied the intent of bills he had introduced earlier which would have amended both Titles VI and VII of the 1964 Civil Rights Act to include the

handicapped. *Id.* at 32310. Finally, Senator Williams, chairman of the full Committee on Labor and Public Welfare, during debate on the third version of the bill, reviewed provisions retained from the first two versions, including, "prohibitions against discrimination in employment in programs assisted with Federal funds." 119 Cong. Rec. 24588.

These few direct references to §504 support the conclusion that the intent of Congress matched the broad sweep of its language. We turn now to the question of whether Congress intended to narrow the scope of §504 by the 1978 amendments, specifically §505(a)(2).

B

Section 505(a)(2) originated in the Senate and was adopted by the Committee of Conference assigned to reconcile the Senate and House versions of the 1978 amendments to the Rehabilitation Act. House Conf. Rep. No. 95-1780, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 7375, 7404. Although the Joint Explanatory Statement of the Committee of Conference offers no assistance in interpreting the provision, noting only that the House receded in its opposition to §505(a)(2), *id.*, the report of the Senate Committee on Human Resources accompanying the original Senate bill discusses the purpose of the provision.

The Senate Committee notes that the then Department of Health, Education and Welfare had recently issued regulations enforcing the prohibition against handicap discrimination by federal grantees embodied in §504. These regulations are particularly noteworthy because HEW was assigned the task, by executive order, of coordinating the issuance of regulations enforcing §504 by all federal departments and agencies. These regulations, subsequently codified at 45 C.F.R. §84.1 *et seq.*, prohibited discrimination in employment practices, *id.* at §84.11. Nonetheless, the Committee stated:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. *Thus, this amendment codifies existing practice as a specific statutory requirement.*

Sen. Rep. No. 95-890, 95th Cong. 2d Sess., p. 19. (Emphasis added).

The committee further stated that applying the provisions of Title VI to §504 of the Rehabilitation Act would assure "administrative due process, and provide for administrative consistency within the Federal Government." *Id.*

The committee report contains nothing that would indicate it felt HEW exceeded its statutory authority by prohibiting employment discrimination in its recently promulgated regulations. Similarly, no one during the debate in the Senate or House suggested HEW had gone too far. In fact, the only Congressman who directly mentioned the regulations during debate, Representative Dodd, "strongly supported the long-delayed issuance of the section 504 regulations believing then, as now, that the protections they establish for the handicapped are very much needed." 124 Cong. Rec. 13905.

Several proposed amendments to the act, and the debate on them, further indicate that Congress understood §504 to reach employment discrimination, when enacted and as amended. For example, Senator Cannon proposed during debate an amendment which, for the purpose of §503 and §504 of the Rehabilitation Act, would exclude from the definition of handicapped individual an alcoholic or drug abuser "whose condition of alcoholism or drug abuse renders that individual not qualified for employment . . ." The purpose of Senator Cannon's amendment, which was eventually passed and codified at 29 U.S.C. §707(7)(A), was: "To exclude alco-

holics and drug abusers from certain employment provisions of the Rehabilitation Act . . ." 124 Cong. Rec. 30322. Its scope was considerably narrower than a similar measure proposed in the House which would have excluded alcoholics and drug abusers from the definition of handicapped individuals altogether, regardless of whether their condition impacted on their employability or not.

Clearly, Senator Cannon believed §504 reached employment discrimination, and nobody during the debate on his argument suggested otherwise. More specifically, nobody suggested that if §504 had at one time reached employment discrimination, the proposed §505(a)(2) would have the effect of eliminating it from its scope. Senator Williams, chairman of the Committee on Human Resources, spoke in support of Senator Cannon's amendment, which he felt necessary "because of misunderstandings and distortions concerning employment rights of alcoholics and drug dependent persons." *Id.* at 30323. Senator Williams felt the amendment "would reassure employers that it is not the intent of Congress to require any employer to hire a person who is not qualified for the position or who cannot perform competently in his or her job." *Id.*

Senator Hathaway also spoke in support of the amendment because he felt it would protect those many alcoholics and drug addicts who hold jobs and perform them satisfactorily. "Sections 503 and 504 of the Rehabilitation Act protect such persons employed by agencies which receive Federal funds or employers which have Federal contracts from being fired solely because of their alcoholism or drug addiction." *Id.* at 30324.

Another amendment proposed during debate would have amended §505(a)(1) to limit a court in an action brought against the federal government to equitable and affirmative action remedies proportionate to actual dam-

ages.[4] 124 Cong. Rec. 30576. Its sponsor, Senator McClure, described the amendment's function as insuring "that mammoth affirmative action remedies involving substantial construction could not be compelled in instances in which actual damages were comparatively small." *Id.*

Senator McClure's amendment was vehemently opposed by Senator Cranston, a sponsor of the 1978 act, on the basis that the federal government should be required to do no less than private employers. Senator Cranston argued:

> The amendment offered by the Senator from Idaho would create an unwise and unrealistic distinction with respect to employment between the obligations of the Federal Government and the obligations of Federal contractors and grantees. Ironically, the Senator's amendment would limit — with a financial test — the Federal Government's obligation of being an equal opportunity employer. Federal contractors and grantees would — appropriately — continue to be required to be equal opportunity employers.

Id. at 30577-30578.

Finally, we would note the remarks of Representative Jefford, a member of the Subcommittee on Select Education, which reported the House version of the act, commenting on the creation of the Architectural and Transportation Barriers Compliance Board in §118 of the amendments:

> [W]e gave this board new and expanded responsibilities *for this one aspect of 504*. It is our

4. A compromise was reached later in debate, which resulted in the following language being inserted in §505(a)(1): "In fashioning an equitable or affirmative action remedy . . . a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy." 29 U.S.C. §794a(a)(1).

> thought that by separating only the "physical" barriers . . . from actual discrimination in *jobs*, education, housing, and health, we have taken a significant step forward.

Id. at 13901. (Emphasis added).

None of the above-quoted references to employment discrimination brought forth any objections from the speakers' colleagues in the House and Senate. Indeed, they did not bring forth so much as a question or request for clarification.

Combining the legislative history looking for the intent of Congress is often a frustrating chore. Often the intent of Congress hinges on the remarks of one or two individuals. *See North Haven*, *supra* at 4504. Here our task has not been so difficult. Clearly, the legislative history to the 1978 amendments demonstrates a widespread understanding on the part of Congress that §504, even as amended, proscribed employment discrimination against the handicapped.

C

Post-enactment pronouncements provide confirmation of Congressional intent to cover employment discrimination in §504. The Senate Committee on Labor and Human Resources, whose predecessors reported both the 1973 Rehabilitation Act and its 1978 amendments, stated unequivocally one year after *Trageser*, *supra*:

> [*Trageser*] is not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of, [section 504] regardless of the designated use of the Federal funds received by the employer in question.

In 1980, responsibility for coordinating enforcement of §504 by federal departments and agencies was transferred to the Attorney General. In his analysis of rules promulgated pursuant to this authority, the Attorney General took note of HEW's earlier regulations prohibiting employment discrimination, *Trageser* and *Carmi*, the legislative history of both the 1973 Act and the 1978 amendments, and concluded, "[T]he Department believes that the employment practices of recipients of Federal financial assistance are covered by section 504 regardless of the purpose of the assistance . . ." Nondiscrimination Based on Handicap in Federally Assisted Programs — Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 Fed. Reg. 37620, 37628 (1980).

V

Under the holding of the district court, Conrail is prohibited from discriminating against handicapped passengers, but is free to discriminate against the handicapped in employment. Such an analysis of §504, unless supported by the words of the relevant statutes or their legislative history, is absurd.

Thus far, the handicapped have not been extended the broad protections against discrimination extended women and members of other minority groups. Federal law protects the handicapped only if employed by the federal government, or federal contractors or grantees. To eliminate protection against discrimination in employment by federal grantees would eliminate a substantial portion of the small amount of protection afforded the handicapped. What is a commonsensicle approach to Title VI, thus, becomes a devastating blow within the context of the Rehabilitation Act. "In the context of §504 of the Rehabilitation Act, applied *Trageser*-style, §604 operates as a blunderbuss." *Scanlon*, *supra* at 2163 (Ferguson, J., dissenting). *See also*, *Carmi*, *supra* at 679

(McMillian, J., concurring). Neither the words of the statutes, nor legislative histories, dictate such a result.

For this reason, the order of the district court is reversed, and the case remanded for further consideration and ultimate disposition on the merits.

ADAMS, *Circuit Judge*, concurring in the judgment.

Had this appeal been presented for resolution several months ago, I might well have joined the other four courts of appeals in concluding that the Act was not intended to cover discrimination against the handicapped by private employers. After all, the statute makes no direct reference to private employment, and it certainly is not unreasonable to read the restrictions contained in section 604 of Title VI into the Rehabilitation Act.

Nonetheless, I have concluded that the result reached by the Court in this case is consonant with, and perhaps even compelled by, two recent decisions, one by the Supreme Court, *North Haven Board of Education v. Bell*, 50 U.S.L.W. 4501 (U.S. May 17, 1982), and the second by this Court, *Grove City College v. Bell*, No. 80-2383, slip op., (3d Cir. Aug. 12, 1982). And whatever I might think of the wisdom of these two decisions, I am bound to apply them unless they are overruled.

In *North Haven*,[1] *supra*, the Supreme Court concluded that the Department of Education had statutory authority to regulate employment discrimination in education — even though Title IX of the Education Act makes no direct reference to employment, and even though Title IX, which was patterned after Title VI, might be thought to incorporate the employment-regulation restrictions of section 604 of Title VI. Never-

1. *North Haven* involved claims of gender discrimination committed by two public school districts in Connecticut. The Supreme Court noted that one of those districts, North Haven, "devoted between 46.8% and 66.9% of its federal assistance to the salaries of its employees." 50 U.S.L.W. at 4502.

theless, the Justices reasoned that the broad-sweeping language of Title IX, which did not explicitly rule out the regulation of employment discrimination, when coupled with a strong legislative and postenactment history, constituted a sufficient basis from which to infer a congressional intent to bring employees within the protection of Title IX. The *North Haven* analysis, when applied to the words of the Rehabilitation Act — which for all relevant purposes are identical to the words of Title IX — and when considered in connection within the strong legislative history of section 504, would appear to compel a similar conclusion. The theory and analysis underlying *North Haven*, then, would suggest that LeStrange prevail on this appeal.

In addition to *North Haven*, I am persuaded that it would be difficult to arrive at a contrary result in this matter after the recent opinion in *Grove City*, *supra*. In *Grove City*, also decided under Title IX of the Education Act, a panel of this Court concluded that an entire educational institution is brought within the definition of "program," and therefore subject to regulation under Title IX, if it receives any federal aid, and that aid is general or indirect and not specifically earmarked for a particular educational function within the institution. The logic of *Grove City* would appear to be irreconcilable with the analysis employed in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), where an employer was deemed to fall within the purview of the Rehabilitation Act only if federal funds were received specifically for employment purposes.

For these reasons I join the judgment of the Court in returning this matter to the district court for further proceedings.

WEIS, *Circuit Judge*, concurring.

I join in the judgment of the court because I believe the case on which the district court relied, *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), was erroneously decided. I agree that the issue in this case is not one of standing, as that term is ordinarily used, *see, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 50 U.S.L.W. 4103, 4105-06 (Jan. 12, 1982), but is the more direct question of the scope of §504.

Trageser held that the prohibition against handicap discrimination in §504 of the Rehabilitation Act is limited by the reference in §505(a)(2) to the provisions of Title VI of the Civil Rights Act of 1964. That is, a claim of employment discrimination against the handicapped is subject to §604 of Title VI: "Nothing contained in this subchapter shall be construed to authorize action . . . by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. §2000d-3.

Although it recognized that "§604 expressly curtails the authority of federal departments and agencies," the *Trageser* court concluded that "it also restricts private suits." 590 F.2d at 89. The court cited no authority for its conclusion and I am persuaded that it erred in applying §604 to private suits. The language of §604 confines its application to "action . . . by any department or agency" and does not refer at any point to suits brought by a private individual or entity.

The Rehabilitation Act's reference to Title VI was not intended to restrict the remedies of handicapped individuals but rather to limit the sanctions which government agencies could take against an offending recipient of federal financial assistance. Congress enacted §604 because it feared that when an employment violation occurred, an overzealous federal agency might threaten

the very existence of important programs by invoking the remedy of withholding funds.[1] The reference to Title VI in §505(a)(2) of the Rehabilitation Act must therefore be interpreted with the understanding that §604 was drafted to prevent administrative overkill. Viewed in this light, it is clear that the incorporation of §604 narrows not the rights of victims, but only the coercive measures which a "department or agency" can apply against an offender.

The dissenting opinion of Judge Ferguson in *Scanlon v. Atascadero State Hospital*, No. 80-5201 (9th Cir. May 24, 1982), analyzes the errors of the *Trageser* opinion at length. I agree with Judge Ferguson and see no need to repeat here the reasoning which underlies the conclusions we both reach. *See also, Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 676 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980), McMillian, J. (conc.).

It is worth noting that in *NAACP v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979), this court concluded that there is a private right of action under §504. Our holding today is wholly consistent with that case.

Of course, I intimate no views on the merits of this case and concur in the remand to the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

1. During congressional debates, Title VI was commonly referred to as the "cut-off-the-funds title." *See* Comment, *Employment Discrimination Against the Handicapped: Can Trageser Repeal the Private Right of Action*, 54 N.Y.U.L. Rev. 1173, 1186 n.69.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LE STRANGE, *Plaintiff*	)	
v.	)	Civil Action
CONSOLIDATED RAIL CORPORATION, *Defendant*	)	No. 78-0944

OPINION

Plaintiff, who was employed by Erie Lackawanna Railroad as a locomotive engineer prior to the amputation of his left hand and a portion of his left forearm in 1971, brings this action against defendant, successor in interest to the Erie Lackawanna Railroad, requesting injunctive relief, compensatory damages, punitive damages and attorney's fees.

Plaintiff alleges that shortly after the amputation of his left hand and a portion of his left forearm, he was refused employment by Erie Lackawanna Railroad without a hearing or medical examination. In 1973 defendant became the successor in interest to Erie Lackawanna Railroad pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-779 (hereafter Rail Act) receiving federal financial assistance in the form of "loans" and by way of reimbursement for money paid out by defendant pursuant to the employee protective benefits authorized by Title V of the Act. Plaintiff alleges that from 1973 to April 4, 1978, defendant refused plaintiff employment without the benefit of a medical evaluation or a hearing. Plaintiff was examined by a physician chosen by defendant on April 4, 1978. Defendant classified plaintiff as not qualified for employment as a locomotive engineer on May 2, 1978. Plaintiff was afforded the opportunity to participate in a field test given by defendant on February 15, 1979. Defendant con-

cluded that plaintiff failed the field test and plaintiff charged that the test was unfair. As a result, a second field test was scheduled but was not conducted as plaintiff refused to cooperate, alleging the second test was also unfairly designed to disqualify him as a yard engineer.

In his complaint plaintiff alleges that defendant violated the equal protection clause of the Fourteenth Amendment, the Civil Rights Act, 42 U.S.C. §1983, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (hereafter §504 of the Rehabilitation Act). By order dated November 4, 1980, this court granted defendant's motion to dismiss plaintiff's claims based upon the equal protection clause and the Civil Rights Act, but denied the motion to dismiss as to the claim under §504 of the Rehabilitation Act of 1973. (See *LeStrange v. Consolidated Rail Corporation* (hereafter *LeStrange v. Con. Rail I*), 501 F. Supp. 964, M.D. Pa. 1980).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant has moved for summary judgment in its favor on the issue of plaintiff's standing to bring a private action under §504 of the Rehabilitation Act. In support of its motion, defendant argues that plaintiff cannot maintain a private cause of action under §504 unless he proves that the defendant receives federal financial assistance, the primary purpose of which is to provide employment *and* that plaintiff is a primary beneficiary of the federal funding. Defendant cites as authority for this test *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978) *cert. denied*, 422 U.S. 947 (1979); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980) *cert. denied*, 449 U.S. 892 (1980); *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980); and this court's earlier decision in this case, reported at 501 F. Supp. 964. Defendant also cites recent district court decisions interpreting *Trageser*, *Carmi* and *Simpson* which have reached the same result. These include *Miller v. Abilene Chris-*

tian University, 26 FEP Cases 346 (N.D. Tex. 1981) and *Hall v. Board of County Commissioners*, 509 F. Supp. 841 (D. Md. 1981).

Plaintiff reads *Trageser*, *Carmi* and this court's earlier decision as requiring him to prove that the defendant received federal financial assistance which had a primary objective of providing employment *or* that plaintiff was a primary beneficiary of federal assistance.

In *LeStrange v. Con. Rail I*, *supra* at 968, this court held that the right to bring a private cause of action under §504 of the Rehabilitation Act was governed by the procedures set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*. The court reached this decision based upn §120(a) of the Comprehensive Rehabilitation Services Amendments of 1978, 29 U.S.C. §794a(a)(2). Section 794a(a)(2) states:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d *et seq.*) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under §504 of this Act (29 U.S.C. §794).

Looking to Title VI of the Civil Rights Act, two provisions are relevant in resolving the standing issue under §504 of the Rehabilitation Act. 42 U.S.C. §2000d states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d-3 states that:

> Nothing contained in this title (42 U.S.C. §§2000d - 2000d-4) shall be construed to authorize action under this title (42 U.S.C. §§2000d - 2000d-4) by any department or agency with respect to any employment practice of any employer, employment

agency, or labor organization, except where a primary objective of the Federal financial assistance is to provide employment.

Trageser interpreted the limitations of §2000d-3 as applicable to federal departments and private plaintiffs. 590 F.2d at 89. According to *Trageser*, a judicial remedy for employment discrimination by institutions receiving federal funds does not exist unless 1) providing employment is a primary objective of the federal aid received by the defendant, *or* 2) discrimination in employment necessarily causes discrimination against primary beneficiaries of the federal aid. 590 F.2d at 89. (Emphasis added). This court agrees with the *Trageser* interpretation of §2000d-3. In further support of this reading of §2000d and §2000d-3, this court in *LeStrange v. Con. Rail I* quoted Department of Transportation (DOT) regulations implementing §2000d and §2000d-3 as they apply to recipients of DOT funding. Those regulations, 49 C.F.R. §21.5(c)(1), (3) (1980) provide:

> (c) Employment practices:
>
> (1) Where a primary objective of a program of Federal financial assistance to which this part applies is to provide employment, a recipient or other party subject to this part shall not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, hiring, firing, upgrading, promotion, demotion, transfer, layoff, termination, rates of pay or other forms of compensation or benefits, selection for training or apprenticeship, use of facilities, and treatment of employees). Such recipient shall take affirmative action to insure that applicants are employed, and employees are treated during employment, without regard to their race, color, or national origin. The requirements applicable to

construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive Order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the grounds of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the provisions of paragraph (c)(1) of this section shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

The DOT regulations implementing §2000d and §2000d-3 are relevant in this case in two respects. Defendant is a recipient of DOT funding[1] and thus is subject to the regulations. Additionally, no regulations have been promulgated to reflect the changes made by the 1978 amendments to the Rehabilitation Act.[2] As previously noted, the 1978 amendments made the rights and remedies under the Rehabilitation Act coextensive with the rights and remedies available under 42 U.S.C.

---

1. Conrail receives federal funds in the form of securities purchased by the United States Railway Association under §216 of the Rail Act, and, prior to September 1, 1981, by way of reimbursement for money paid out by defendant to meet the employee protective benefits mandated by Title V of the Act.

2. Executive Order No. 12250, 45 Fed. Reg. 72995 (1980) directs the United States Attorney General to coordinate the implementation and enforcement of the 1978 amendments to the Rehabilitation Act. No final regulations to implement the 1978 changes have been issued.

§2000d *et seq.* It thus is relevant to examine existing regulations implementing §2000d *et seq.* for purposes of resolving the standing issue in this case.

The *Trageser* court listed the tests of standing for Title VI of the Civil Rights Act of 1964 in the alternative. Although language later in *Trageser* suggests that under both tests a plaintiff must show that the defendant received federal funds whose primary objective was to provide employment[3], this court reads *Trageser* as holding that only the first test requires such a showing. *Trageser* cited *Caulfield v. Board of Education*, 583 F.2d 605 (2d Cir. 1978) and *U.S. v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966) (*aff'd en banc*), 380 F.2d 385 (5th Cir.) (per curiam), *cert. denied sub nom Caddo Parish School Board v. United States*, 389 U.S. 840 (1967) in support of its second test. These cases indicate that the second test does not require a showing of federal funding whose primary purpose is to provide employment. The Second Circuit in *Caulfield* drew a distinction between 42 U.S.C. §2000d and §2000d-3 based upon HEW implementing regulations. The regulations cited by *Caulfield* are almost identical to the DOT regulations quoted by this court to govern defendant Conrail's receipt of federal funds. Based upon the HEW regulations, the Second Circuit held that the Office of Civil Rights could investigate racial and ethnic discrimination in employment practices in a New York City school system based upon §2000d because the impact of the employment practices affected minority school children who were denied the benefit of teachers with more experience and advanced degrees. There was no show-

---

3. Shortly after listing the standing tests in the alternative, the *Trageser* court then made the following somewhat contradictory statement:

> A private action under §504 [of the Rehabilitation Act] to redress employment discrimination therefore may not be maintained unless a primary objective of the federal financial assistance is to provide employment. 590 F.2d at 89.

ing that the primary goal of federal financial assistance received by the school system was to provide employment. The court also rejected the argument that §2000d-3 prohibited the investigation. 583 F.2d at 611. The Second Circuit has not been overruled on this holding.[4]

Trageser also cited *U.S. v. Jefferson County Board of Education, supra* as support for the second test. In *Jefferson* the Fifth Circuit also dealt with 42 U.S.C. §2000d and 42 U.S.C. §2000d-3. The Court explained the legislative history behind the two provisions and drew a distinction between them. The Court read 2000d as "a clear congressional statement that racial discrimination against the beneficiaries of federal assistance is unlawful." 372 F.2d at 882. The Court then explained that after §601 of the Civil Rights Act (42 U.S.C. §2000d) was proposed, "additional clarifying language was suggested to make it clear that discrimination in certain employer-employee relationships, not affecting the intended beneficiaries of the program, would be excluded from the reach of the statute." *Id.* at 883. (Citations omitted). Section 604 of the Civil Rights Act (42

4. The Second Circuit reached a different result in *United States v. Cabrini Medical Center*, 639 F.2d 908 (2nd Cir. 1981). The Second Circuit was again required to interpret the limitations of §2000d and §2000d-3 but this time in the context of the Rehabilitation Act. The Court held that the Department of Health and Human Services' Office for Civil Rights (OCR) was not authorized to investigate a complaint by a hospital employee that he had been discharged in violation of the Rehabilitation Act. The Court found that the defendant hospital received Medicare and Medicaid payments but that such federal financial assistance did not have a primary objective of providing employment and thus under the limitations of §2000d-3 the OCR lacked authority to investigate the complaint. The Court drew no distinction between §2000d and §2000d-3 as it had done in *Caulfield*. No explanation was given by the Court as to why its reading of these two provisions appeared to be narrower than its earlier interpretation in *Caulfield*. This court finds *Caulfield* more persuasive as to the proper interpretation of the two provisions.

U.S.C. §2000d-3) was then added to achieve this purpose. The Court then upheld HEW guidelines requiring desegregation of facilities and school personnel of public schools receiving federal financial assistance. The Court found the agency guidelines fell within the ambit of §2000d because school children were the primary beneficiaries of federal assistance to schools and to the extent that teacher discrimination jeopardized the success of desegregation, it was unlawful wholly aside from its effect upon individual teachers. 372 F.2d at 883. The Court specifically rejected the defendant school board's argument that §2000d-3 prevented HEW's interference with the employment practices of schools. The Court stated that §2000d-3 was never intended as a limitation on desegregation of schools and that the defendant's argument would frustrate the desegregation purposes of the statute.

This analysis shows that the Fifth Circuit did not read §2000d-3 as preventing action against employment discrimination which caused discrimination to beneficiaries of federal financial assistance, even when the primary purpose of the federal assistance was not to provide employment.

Courts since *Jefferson* have read §2000d-3 in the same manner. *See United States v. El Camino Community College District*, 454 F. Supp. 825, 831 (C.D. Cal. 1978), *cert. denied*, 444 U.S. 1013 (1980); *United States v. Frazer*, 297 F. Supp. 319, 322 (M.D. Ala. 1968).

This court agrees with *Caulfield* and *Jefferson* that a plaintiff has standing under 42 U.S.C. §2000d-3 to bring suit for employment discrimination against an employer receiving federal financial assistance if the plaintiff shows that discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid. Under this test the plaintiff does not need to show that a primary objective of the federal assistance is to provide employment. There is nothing in the conference report on §505(a)(2) of the Comprehen-

sive Rehabilitation Services Amendments of 1978 (which made the remedies of Title VI of the Civil Rights Act of 1964 applicable to persons aggrieved by acts of recipients of federal assistance) indicating congressional disagreement with the interpretation given by *Caulfield* and *Jefferson* to 42 U.S.C. §§2000d and 2000d-3. Thus, there appears no reason to ignore this interpretation of the provisions as applied to cases brought under the Rehabilitation Act of 1973. This analysis thus applies to a plaintiff bringing suit under §504 of the Rehabilitation Act of 1973 as amended, since the remedies available under the Rehabilitation Act are coextensive with those available under Title VI of the Civil Rights Act.

In summary, this court holds that a private plaintiff has standing to bring suit under §504 of the Rehabilitation Act of 1973 if he shows *either* that the defendant receives federal financial assistance whose primary purpose is to provide employment or that discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid. No showing of a primary employment objective of the federal assistance is needed under the second test.[5]

Defendant argues that the first test has two components, both of which must be met. The components require that: a) defendant receives federal financial assistance, the primary purpose of which is to provide employment; b) plaintiff is a primary beneficiary of the federal funds. In support of this statement, defendant

---

5. This interpretation of 42 U.S.C. §2000d and 42 U.S.C. §2000d-3 as applied to the Rehabilitation Act sets this court apart from other courts who have construed *Trageser* as requiring a showing of a primary employment objective before any private suit under §504 may be maintained. Nothing has come to this court's attention in these later cases to persuade it that *Trageser* should be so read. *See Miller v. Abilene Christian University, supra,* at 347-48; *Hall v. Board of County Commissioners, supra* at 849; *Cabrini, supra* at 911; *Carmi v. Metropolitan St. Louis Sewer District, supra* at 674-75.

cites *Trageser*, *supra* at 89; *Carmi*, *supra* at 675; *Simpson v. Reynolds Metals Co.*, *supra* at 1234.

In Carmi, the Eighth Circuit first examined the language of §504 of the Rehabilitation Act which states:

> No otherwise qualified handicapped individual in the United States, as defined in section 7(7) (29 U.S.C. §706(7)) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

The Court then addressed the application of 42 U.S.C. §2000d-3 to the Rehabilitation Act of 1973. The Court examined the legislative history of 2000d-3 and found that Congress did not intend to extend protection under that section to any person other than the intended beneficiary of federal financial assistance. 620 F.2d at 674, n.4. The *Carmi* court applied this reading of §2000d-3 to suits brought under §504 of the Rehabilitation Act and held that while defendant Metropolitan Sewer District received federal financial assistance in the form of construction and engineering grants, plaintiff, a job applicant who was rejected as a fork lift operator by the defendant due to a physical disability, was not an intended beneficiary of the funds and thus lacked standing to bring suit under §504 of the Rehabilitation Act. 620 F.2d at 675.

In *Simpson*, the Seventh Circuit further refined the scope of the Rehabilitation Act. *Simpson* agreed with the *Carmi* analysis of 42 U.S.C. §§2000d and 2000d-3 as applied to suits brought under §504 of the Rehabilitation Act. 629 F.2d at 1235. The *Simpson* court also examined the legislative history of the Rehabilitation Act and concluded that it authorizes recovery only where the discrimination comes in the operation of a program receiving federal financial assistance, or manifests itself in a handicapped individual's exclusion from the program or

a diminution of the benefits he would otherwise receive from the program. 629 F.2d at 1232. The plaintiff in *Simpson* failed to demonstrate any connection between his discharge from employment by the defendant due to chronic alcoholism and operation of a training program run with federal funding by defendant. Simpson was neither eligible to participate in the program, nor was he denied the benefits of the program by his discharge or subjected to discrimination in its operation. Thus the Court found he lacked standing to bring suit under §504 of the Rehabilitation Act. 629 F.2d at 1231.

This court agrees with the holdings of *Carmi* and *Simpson* on this issue and holds that a plaintiff bringing suit under §504 of the Rehabilitation Act must under the first test for standing, demonstrate that the defendant receives federal financial assistance whose primary objective is to provide employment and that defendant's discriminatory action has excluded plaintiff from participation in the program receiving such aid or caused plaintiff to suffer a diminution in benefits he would otherwise have received from the program or subjected plaintiff to discrimination in operation of the program.

Applying the first test of standing, plaintiff argues that Title V of the Rail Act has a primary goal of providing employment. In support of this position, plaintiff cites numerous provisions from Title V of the Act as well as sections from the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. §§803, 836(a), (b)(3). Defendant contends that the primary purpose of Title V of the Rail Act when read in its entirety is not to create new jobs but to minimize loss of employment and compensate employees who lost their jobs as a result of the railroad reorganization undertaken by the Rail Act. Defendant's brief in response to plaintiff's brief filed in opposition to defendant's motion for summary judgment addresses each of the sections cited by plaintiff and negates his suggestion that a primary employment objective exists, as required by §2000d-3. This court agrees

with defendant's analysis of the individual provisions of Title V and will not repeat the arguments advanced by defendant, except to highlight certain important points. (Relevant portions of defendant's brief are attached as an appendix to this opinion.)

The first point to emphasize is that plaintiff implicitly assumes that the language of 42 U.S.C. §2000d-3 extends to programs that compensate for job loss as well as to programs that create new jobs. This assumption is apparent in that almost all of the statutory provisions cited by plaintiff apply only to "protected employees"[6] of Title V of the Rail Act and not to new hires. (See appendix for provisions cited by plaintiff). Plaintiff fails to cite any legislative history to support this reading of §2000d-3. This court has found no indication that §2000d-3 should be so construed either in the legislative history of the provision or in judicial interpretation of it. This court believes that §2000d-3 covers only those programs whose primary goal is to create new jobs. Support for this view of §2000d-3 is found in *Trageser*. The *Tragser* court rejected the notion that receipt of Medicare, Medicaid, Veterans Administration and welfare payments had a primary purpose of employing nurses to care for patients entitled to receive the payments. 590

---

6. (3) "protected employee" means any employee of —

(A) an acquiring or selling railroad who is adversely affected by a transaction;

(B) the Corporation who, immediately preceding such employment by the Corporation, was employed by a selling railroad and who is adversely affected by the sale of rail properties to the Corporation pursuant to an offer designated under section 206(c)(2) of this Act [45 U.S.C. §716 (c)(2)];

(C) a railroad in reorganization in the region; and

(D) a railroad who is adversely affected by a supplemental transaction under section 305 of this Act [45 U.S.C. §745] or by a project recommended under section 206(g) of this Act [45 U.S.C. §716 (g)]; who, in any such case, has not reached age 65 on the effective date of this Act [enacted Jan. 2, 1974]; 45 U.S.C. §771(3).

F.2d at 88. The *Trageser* court could have found that a primary employment objective existed since an incidental effect of the funds could have resulted in the hiring of additional nurses to care for recipient patients or at least the retention of nurses already on the payroll. Since the *Trageser* court failed to find that §2000d-3 was satisfied, it stands to reason that the court would reject the argument that the incidental creation of some new jobs or the incidental retention of some present jobs falls within the meaning of §2000d-3. In the instant case, federal funding under Title V of the Rail Act was, according to the conference report on the bill, to "provide *benefits* and *protections* for protected employees . . ." (emphasis added).[7] Although there are some provisions in Title V that incidentally create new jobs (§776 — Contracting Out) and that discuss retention of current employees of railroads in reorganization (772(b) — Employment offers - Mandatory offer), these provisions are an incidental — and not primary goal of Title V and are limited in scope. (See defendant's brief attached for discussion of §§776 and 772(b)). As discussed later in this opinion, the principal focus of Title V was to provide protection to protected employees adversely affected by the rail reorganization. Thus, even though an incidental effect of Title V was the creation of some new jobs and even though retention of current employees is mentioned, no primary goal of providing new jobs is mentioned. Thus, the present case parallels *Trageser* and under *Trageser* §2000d-3 is not satisfied.

Reference to other portions of the Rail Act, its legislative history and subsequent amendments to it leave no doubt that the Act in general and Title V in particular did not have a primary goal of providing employment as envisioned by §2000d-3. The purposes of the Rail Act

---

7. House Conference Report No. 93-744, 93rd Cong. 1st Sess. to accompany H.R. 9142, *reprinted in* [1973] U.S. Code Cong. & Ad. News 3242, 3335.

make no mention of job creation.[8] The final system plan, which is the plan of reorganization for the restructure and modernization of railroads in reorganization under the Act, makes no mention of job creation. Although the plan lists as one of its goals, "the minimization of job losses and associated increases in unemployment,"[9] this wording does not indicate that the Rail Act was enacted as a job creation program. The Senate report on S 2767, the Senate version of the Rail Act, made the following statement about the Act's impact, again showing lack of a job creation goal:

> There is also a need to provide for those persons who will *lose* their jobs as a result of this reorganization. These societal costs, whether provided in the form of unemployment, welfare, and other social costs, or in the form of employee protective provisions within the context of the railroad restructuring effort, must ultimately be borne by the society as

---

8. The purposes of the Rail Act are listed below —

(b) Purposes. — It is therefore declared to be the purpose of Congress in this Act to provide for —

(1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this Region and of the national rail transportation system;

(2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

(3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;

(4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;

(5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and

(6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.

45 U.S.C. §701 (b).

9. 45 U.S.C. §716(a)(8).

a whole. Providing for these costs as an integral part of the restructuring effort will allow for a rational and orderly process, while at the same time permitting much greater labor flexibility on the part of the management of the new corporation. These provisions will vastly increase the ability of the new corporation to operate a viable railroad system in the Northeast and Midwest regions. (Emphasis added). S. Rep. No. 93-601, 93rd Cong. 1st Sess., *reprinted in* (1973) U.S. Code Cong. & Ad. News 3242, 3254.

Finally, 45 U.S.C. 836[10], added by the Railroad Revitalization and Regulatory Reform Act of 1976 is cited by plaintiff as proof of the primary employment objective

---

10. 45 U.S.C. §836 provides:

836. Employee protection. — (a) General — Fair and equitable arrangements shall be provided, in accordance with this section, to protect the interests of any employees not otherwise protected under title V of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 771 *et seq.*) by actions taken pursuant to authorizations or approval obtained under this title. Such arrangements shall be determined by the execution of an agreement between the representatives of the railroads and the representatives of their employees, within 120 days after the date of enactment of this title [enacted Feb. 5, 1976]. In the absence of such an executed agreement, the Secretary of Labor shall prescribe the applicable protective arrangements, within 150 days after the date of enactment of this title [enacted Feb. 5, 1976].

(b) Terms. — The arrangements required by subsection (a) of this section shall apply to each employee who has an employment relationship with a railroad on the date on which such railroad first applies for applicable financial assistance under this title. Such arrangements shall include such provisions as may be necessary for the negotiation and execution of agreements as to the manner in which the protective arrangements shall be applied, including notice requirements. Such agreements shall be executed prior to implementation of work funded from financial assistance under this title. If such an agreement is not reached within 30 days after the date on which an application for such assistance is approved, either party to the dispute may submit the issue for final and binding arbitration. The decision on any such arbitration shall be rendered within 30 days after such submission. Such arbitration decision

of Title V of the Regional Rail Reorganization Act. Plaintiff's argument is not persuasive. The purposes of the RRRR Act make no mention of providing new employment nor does the legislative history of §836.[11]

---

shall in no way modify the protection afforded in the protective arrangements established pursuant to this section, shall be final and binding on the parties thereto, and shall become a part of the agreement. Such arrangements shall also include such provisions as may be necessary —

(1) for the preservation of compensation (including subsequent general wage increases, vacation allowances, and monthly compensation guarantees), rights, privileges, and benefits (including fringe benefits such as pensions, hospitalization, and vacations, under the same conditions and so long as such benefits continue to be accorded to other employees of the employing railroad in active service or on furlough, as the case may be) to such employees under existing collective-bargaining agreements or otherwise;

(2) to provide for final and binding arbitration of any dispute which cannot be settled by the parties, with respect to the interpretation, application, or enforcement of the provisions of the protective arrangements;

(3) to provide that an employee who is unable to secure employment by the exercise of his or her seniority rights, as a result of actions taken with financial assistance obtained under this title, shall be offered reassignment and, where necessary, retraining to fill a position comparable to the position held at the time of such adverse effect and for which he is, or by training and retraining can become, physically and mentally qualified, so long as such offer is not in contravention of collective bargaining agreements relating thereto; and

(4) to provide that the protection afforded pursuant to this section shall not be applicable to employees benefited solely as a result of the work which is financed by funds provided pursuant to this title.

(c) Subcontracting. — The arrangements which are required to be negotiated by the parties or prescribed by the Secretary of Labor, pursuant to subsections (a) and (b) of this section, shall include provisions regulating subcontracting by the railroads of work which is financed by funds provided pursuant to this title. (Feb. 5, 1976, P. L. 94-210, Title V, §516, 90 Stat. 82.)

11. See Senate Conference report No. 94-595, 94th Cong., 2nd Sess., *reprinted in* (1976) U.S. Code Cong. & Ad. News 14, 222-26.

In sum, nothing in Title V of the Rail Act supports a finding that the primary purpose of federal funding under that title was to provide new employment. Thus plaintiff fails to meet the first component of test one for standing, as set out by *Trageser* and interpreted by this court.

Plaintiff argues that he meets the second component of test one for standing. He contends that he is a primary beneficiary of federal financial assistance under the Rail Act on the basis that he is a protected employee under Title V of the Act, and that he was covered by a collective bargaining agreement with the Erie Lackawanna Railroad prior to its conveyance to Conrail. Although plaintiff has failed to meet *Trageser's* first test for standing by failing to satisfy its first component, this court will address the second component because of its relevance in resolving standing under *Trageser's* second test.

Under the second component of *Trageser's* first standing test, plaintiff must show that he is a primary or intended beneficiary of federal financial assistance received by Conrail. According to *Simpson*, in order to prove his status as a primary or intended beneficiary, the plaintiff specifically must prove that discrimination under §504 of the Rehabilitation Act came in the operation of Title V of the Rail Act, or manifested itself in plaintiff's exclusion from this program or in diminution of the benefits he would otherwise have received from the program.

Plaintiff contends that he is a primary or intended beneficiary under Title V because he fits one of the definitions of a protected employee listed in 45 U.S.C. §771(3). Under 45 U.S.C. §771(3)(C), a protected employee is "any employee of a railroad in reorganization in the region." Plaintiff contends that he is an employee of a railroad in reorganization, defined "as a person, who on the effective date of a conveyance of rail properties of a railroad in reorganization to the Corporation . . . has an

employment relationship with . . . said railroad in reorganization. . . ."[12] Plaintiff asserts that he had an employment relationship with Erie Lackawanna, in the form of a medical leave of absence, at the time of the conveyance. While it appears that plaintiff meets the definition of a protected employee, this fact standing alone is not persuasive that plaintiff is a primary beneficiary of Title V.

The primary goal of Title V[13] was to provide benefits and protection to employees of railroads *adversely* affected by the reorganization. This fact is made clear from an examination of the statements cited in footnote 13 concerning Title V in general and from a review of the primary employee protective provisions of Title V. Under 45 U.S.C. §775(a), a protected employee whose employment is governed by a collective bargaining agreement is assured of not being placed in a *worse position* with respect to compensation, working conditions and other matters, subject to certain limitations. Under §775(b), a protected employee is provided with a monthly displacement allowance for certain periods in which the employee is *deprived of employment*. Under

---

12. 45 U.S.C. §771(2).

13. In addition to statements already cited in this opinion, the following statements are useful in determining the primary goal of Title V:

> The provisions of this bill, while beneficial to the Nation and the consuming public, could have an extremely painful effect on thousands of employees *whose jobs could disappear* in the process of reorganization and restructuring. (Emphasis added). (S. Rep. No. 93-601, 93rd Cong., 1st Sess., *reprinted in* (1973) U.S. Code Cong. & Ad. News 3242, 3246).
>
> To say the least, this is rather extraordinary relief for one segment of organized labor, despite the fact that many other groups of workers have also been *adversely affected* in the past by government action. (Emphasis added.) (Additional view of Messrs. Cotton, Griffin, Cook and Beall to S. Rep. No. 93-601, 93rd Cong., 1st Sess., *reprinted in* (1973) U.S. Code Cong. & Ad. News 3242, 3305).

§775(d), a protected employee who has been *deprived of employment* may be transferred to bona fide vacancies in certain situations. Under §775(e), a protected employee who is *tendered and accepts an offer by the* corporation *to resign* and sever his employment relationship is entitled to a separation allowance under specified conditions. Under §775(f), the Corporation *may* terminate an employee of a railroad in reorganization with less than three years' service with such railroad and such employee is entitled to specified benefits. Under §775(g), a protected employee who is *required to make a change of residence* as a result of a transaction is entitled to specified benefits.

Plaintiff has failed to show that he suffered any adverse effect from the conveyance of the Erie Lackawanna to Conrail. Prior to the conveyance plaintiff was on a medical leave of absence and he has maintained that status since the conveyance. He thus was never placed in a worse position with respect to compensation, nor deprived of employment and hence is ineligible for a monthly displacement allowance nor was he required to make a change of residence, nor was he a recipient of a separation allowance or termination allowance. In short, even though plaintiff meets the definition of a protected employee, he still is ineligible for those protections forming the primary core of Title V.

Similarly, even though plaintiff, as an employee of a railroad in reorganization, was entitled to and did receive a mandatory offer of employment from Conrail following the conveyance of the Erie Lackawanna, as required by 45 U.S.C. §772(b), plaintiff still is ineligible for those protections available to a protected employee adversely affected by the reorganization. Significantly, §772(b) states that an employee to whom a mandatory offer of employment is extended is to receive the protective benefits of Title V. Plaintiff is not entitled to the primary protections of the Act. *See Sabol v. Board of Education of*

the Township of Willingboro, County of Burlington, 510 F. Supp. 892 (D.N.J. 1981), for an analogous situation.

Plaintiff also argues that he is an employee covered by a collective bargaining agreement and hence is an intended beneficiary of Title V. Plaintiff contends that he was covered by a labor agreement with the Erie Lackawanna at the time of the latter's conveyance to Conrail.

Again, the mere fact that plaintiff was covered by a collective bargaining agreement does not elevate plaintiff's status to an intended beneficiary of Title V. It is true that Title V speaks about collective bargaining agreements. It directs Conrail to negotiate new collective bargaining agreements with representatives of employees of railroads in reorganization (45 U.S.C. §774(a)) and provides for interim application of existing collective bargaining agreements until new agreements are negotiated (45 U.S.C. §774(a)). It is important to note, however, that §774(a) specifically states that "provisions in other existing job stabilization agreements shall not be applicable to transactions effected pursuant to this Act to which the provisions of section 505 (45 U.S.C. §775 Employee Protection) of this title shall be superseding and controlling." Similarly, §774(d) directs that the new collective bargaining agreement negotiated between Conrail and representatives of employees of railroads in reorganization "shall not include any provisions for job stabilization resulting from any transaction effected pursuant to this Act which may exceed or conflict with those established herein." These two sections indicate the centrality of those provisions of Title V that provide benefits and protections to protected employees adversely affected by the rail reorganization and the importance of their taking precedence over existing or newly negotiated labor agreements. Thus again, the fact that plaintiff is covered by a labor agreement but ineligible for those protections that form the primary core of Title V prevents plaintiff from occupying an intended beneficiary position under Title V.

Since plaintiff has not shown that he is eligible to participate in those provisions of Title V which form its primary protective provisions he occupies the same position as the plaintiff in *Simpson*. And, as in *Simpson*, plaintiff thus is unable to show that he has been denied admittance to the Title V primary protections by defendant's allegedly discriminatory actions. Nor can he show that defendant's allegedly discriminatory action denied him any of the primary benefits under Title V. Finally, he has not been subjected to discrimination under Title V since there is no connection between his denial of employment and Title V. Thus, plaintiff is not a primary or intended beneficiary of Title V under *Simpson* and thus fails under the second component of *Trageser's* first test of standing.

Plaintiff also attempts to establish standing under the second test set out in *Trageser*. Plaintiff must show that defendant received federal financial assistance and that employment discrimination against plaintiff, a non-beneficiary of the federal aid, causes discrimination against the primary beneficiaries of the aid. *See Sabol, supra* at 898, citing *Simpson*. As previously discussed in this opinion, plaintiff need not show that the primary purpose of the federal financial assistance is to provide employment in order to satisfy the second test.

Plaintiff contends that since he is an employee covered by a collective bargaining agreement, he might be able to prove that any discrimination against him may have necessarily caused discrimination against other employees covered by the collective bargaining agreement. As the court has previously discussed, the mere fact that an employee of a railroad in reorganization is covered by a collective bargaining agreement is not sufficient to classify that person as an intended beneficiary of Title V. Thus, plaintiff can only meet the second standing test of *Trageser* if he shows that discrimination against him resulted in discrimination against protected employees adversely affected by the reorganization who

are the primary and intended beneficiaries of Title V. Plaintiff has made no such claim. And, even if he were able to make such an allegation, he would still fail under the second test. As the *Sabol* court pointed out, a non-beneficiary plaintiff must allege a pattern or practice of discrimination and not one solitary case of discrimination in order to satisfy the second test. 510 F. Supp. at 899. In support of this statement, *Sabol* cites *United States v. Jefferson County Board of Education*, *supra* and *Caulfield v. Board of Education*, *supra* which involved broad policies of discrimination against non-beneficiaries.

Since plaintiff has failed to meet either test of standing for bringing suit under §504 of the Rehabilitation Act of 1973, there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law. Therefore, defendant's motion for summary judgment will be granted.

Sylvia H. Rambo
United States District Judge

Dated:

APPENDIX

A. Providing Employment is Not the Primary Purpose of the Rail Act As a Whole

Although the main focus of plaintiff's argument regarding the purpose of federal funding to Conrail is Title V of the Rail Act, he does cite other portions of the Rail Act. Apparently, plaintiff leafed through the Rail Act to extract any language even remotely connected to an employment issue, losing sight of the fact that it is only the Act's primary purpose which is important. Even the random sections of the Act relied on by plaintiff to prove his point, however, are unconvincing.

First, plaintiff quotes from the goals of the final system plan respecting minimization of job losses and increased unemployment. If anything, that section supports Conrail's argument that the thrust of any employment related sections of the Act is to compensate for *un*employment. Next, plaintiff quotes Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. §803 (the RRRRA), providing for nondiscrimination under that Act. Unfortunately for plaintiff, that section on its face has nothing to do with hiring as he asserts.[1] Furthermore, had plaintiff quoted that section in its entirety, it would have been apparent that the RRRRA has its own enforcement provisions to assure equality of opportunity under programs funded by the RRRRA. In any event, plaintiff shows no connection between himself and any program funded pursuant to RRRRA. Finally, plaintiff relies on yet another section of the RRRRA to show the primary purpose of a different act, the Rail Act. Assuming, *arguendo*, that one section of an act passed three years after the Rail Act would have anything relevant to say about the primary purpose of the Rail Act, the particular section selected by plaintiff for this purpose does not achieve his goal. Plaintiff points

---

1. Nor does it prohibit discrimination against the handicapped.

to Section 516 of the RRRRA, 45 U.S.C. §836 entitled "Employee Protection" to prove that the primary goal of the Rail Act is to provide employment. However, part of that section not quoted by plaintiff makes clear that the employee protection provided applies only to persons *already* employed, not new hires:

> The arrangements required by subsection (a) of this section shall apply to each employee *who has an employment relationship with a railroad* on the date on which such railroad first applies for applicable financial assistance under this subchapter. 45 U.S.C. §836(b).

Moreover, this section could not subject Conrail to liability under Section 504 even if plaintiff were successful in showing that the purpose of the financial assistance available under Subchapter II of the RRRRA is to provide employment. First, plaintiff never shows that Conrail received any federal aid under these provisions. Second, as the part of §836 quoted by plaintiff in his brief shows, this section does not apply to employees protected by Title V. Since plaintiff alleges that he is protected by Title V, plaintiff could never be an intended beneficiary of the aid and thus could not meet his burden of proof under Section 504. *See* Part III, *infra*.

B. Plaintiff's Failure to Focus on Title V As A Comprehensive Approach to the Problem of Employee Protection Distorts His View of Title V

The legislative history of Title V, and the interpretation of the Special Court and arbitrators authorized to interpret Title V, all indicate that Title V was an integral part of Congress' legislative plan for revitalizing rail freight carriers in the Northeast and *not* an employment statute. Plaintiff ignores the fact that Title V was conceived of as an integrated package, all the elements of which contributed to the goal of cushioning the adverse consequences of *un*employment and *under*-employment

expected to result from Conrail's efforts to reach self-sufficiency. Instead he focuses upon isolated portions of Title V, never tying those portions into the larger statutory scheme from which the isolated portions derive their real meaning.

First, plaintiff looks to Section 502, 45 U.S.C. §772 which he says provides for offers of employment to protected individuals. However, what Section 502 actually required was a *mandatory* offer of employment by Conrail to current employees of the bankrupt railroads:

> (b) MANDATORY OFFER. — The Corporation *shall offer employment*, to be effective as of the date of a conveyance or discontinuance of service under the provisions of this Act, *to each employee of a railroad in reorganization in the region* who has not already accepted an offer of employment by the [United States Railway] Association (where applicable), an acquiring railroad, or the Corporation. *Such offers of employment to employees represented by labor organizations shall be confined to their same craft or class. Id.* (Emphasis added.)

Thus, this section did not envision the hiring of new employees or creating new employment opportunities. Conrail could not pick the employees it wanted — Congress mandated that every employee currently employed by a railroad that would become part of Conrail would maintain an employment relationship with the newly created Conrail. Conrail did not even have the choice of offering an employee a position in a different class or craft than the one the employee currently held.

As the statute directed, Conrail did offer to establish an employment relationship with all employees of a railroad in reorganization on April 1, 1976.[2] *See* Affidavit

---

2. Plaintiff insists that his employment relationship with Conrail extends back to the effective date of the Rail Act in 1974. However, as §502(b) above makes clear, the employment relationship was not to be effective until conveyance date or until the railroad in reorganization discontinued service.

of James Leach. These offers were extended to employees of railroads in reorganization who were not working due to disability or an authorized leave of absence as well as active employees, which explains plaintiff's appearance on Conrail seniority rosters. *See* Affidavit of James Leach. No new jobs were created, however, and many of the employees who became active Conrail employees were put in surplus status because Conrail could not utilize all the employees of seven different railroads. *See* Affidavit of James Leach. Congress' objective was to maintain the status quo on employment to the extent possible. At the same time, it recognized that, as with past railroad mergers, there would be a decrease in employment opportunities when seven railroads were compressed into one. Section 505 of Title V provides the compensation for job loss referred to in the final system plan.

The rest of the sections relied on by plaintiff merely give some direction to Conrail in dealing with the thousands of employees who became Conrail employees on April 1, 1976. Section 504, 45 U.S.C. §774 told Conrail how the collective bargaining agreements of seven railroads were to be consolidated into one agreement for each class or craft on Conrail. *See* 45 U.S.C. §774. Section 506, 45 U.S.C. §796 defines, as its title indicates, the circumstances under which Conrail can contract out work which had been performed by employees subject to a collective bargaining agreement. *See* 45 U.S.C. §776. None of these sections deals with the hiring of employees.[3] Finally, plaintiff makes a brief reference to

3. At the pre-trial conference, plaintiff's counsel suggested that the last sentence of Section 506 enables Conrail to set up apprenticeship, training or recruitment programs and thus provides for employment. However, it is clear that the purpose of this section is to restrict Conrail's right to contract out work subject to a collective bargaining agreement to those instances where Conrail has no employees either active or surplus in the particular craft or class who would normally do the work, to perform the work and cannot train any in that craft or class to do the work.

Section 510 of the Rail Act, 45 U.S.C. §780. Once again, that section does not provide any employment and in fact, does not even apply to Conrail. It merely says that *if other railroads* are hiring employees, those railroads should give first consideration to separated or furloughed Conrail employees *provided that* the former Conrail employee would not interfere with the carrier's affirmative action obligations.

As the discussion above indicates, Title V is a very intricate statute that deals with how to effectuate the consolidation of seven railroads into one. Certainly, what to do with all the railroad employees was a major concern of Congress in the consolidation process. However, Title V, regarded as a whole, was designed primarily to handle the contingency of massive unemployment; it was not an attempt to provide new employment opportunities. Because the Rail Act, including Title V, does not have a primary purpose of providing employment, plaintiff's cause of action must fail.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LE STRANGE, *Plaintiff*	:	
v.	:	Civil Action No. 78-0944
CONSOLIDATED RAIL CORPORATION, *Defendant*	:	

ORDER

IT IS HEREBY ORDERED THAT:

1. Defendant's motion for summary judgment on the issue of plaintiff's standing to bring a private action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, is granted.

A discussion of the relevant law is embodied in the opinion filed herewith.

Sylvia H. Rambo
United States District Judge

Dated:

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LE STRANGE, *Plaintiff*	:	
v.	:	Civil Action No. 78-0944
CONSOLIDATED RAIL CORPORATION, *Defendant*	:	

MEMORANDUM

Plaintiff, who was employed by Erie Lackawanna Railroad as an engineer prior to the amputation of his left hand and a portion of his left forearm in 1971, brings this action against defendant, successor in interest to the Erie Lackawanna Railroad, requesting injunctive relief, compensatory damages, punitive damages and attorney's fees. In his complaint, which was filed on September 22, 1978, plaintiff alleges defendant has violated the equal protection clause of the Fourteenth Amendment, the Civil Rights Act, 42 U.S.C. §1983, and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. On October 26, 1979, plaintiff filed an amended complaint to which defendant filed a motion to dismiss on December 3, 1979, supported by a brief filed December 4, 1979. Plaintiff filed a reply brief on February 8, 1980.

Plaintiff alleges that shortly after the amputation of his left hand and a portion of his left forearm, he was refused employment (by Erie Lackawanna Railroad) without a hearing or medical examination. In 1973 defendant became the successor in interest to Erie Lackawanna Railroad pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-779 (hereafter Rail Act) receiving federal assistance in the form of

"loans." Plaintiff alleges that from 1973 to April 4, 1978, defendant refused plaintiff employment without the benefit of a medical evaluation or a hearing. Plaintiff was examined by a physician on April 4, 1978 and was classified as not qualified for employment as an engineer by defendant on May 2, 1978. Plaintiff was afforded the opportunity to participate in a field test given by defendant on February 15, 1979. Defendant concluded that plaintiff failed the field test and plaintiff charged that the test was unfair. As a result, a second field test was scheduled but was not conducted as plaintiff refused to cooperate, alleging the second field test also was unfairly designed to disqualify him as an engineer.

In its motion, defendant contends plaintiff has failed to state a cause of action under the equal protection clause of the Fourteenth Amendment and 42 U.S.C. §1983 as plaintiff has not alleged the required "state action" for the Fourteenth Amendment claim or "acting under color of state law" for the §1983 claim. Plaintiff contends that defendant does operate under color of state law in that it is an interstate common carrier, uses public railways throughout the state, and has received federal financial assistance. Plaintiff concludes that if defendant uses state property and receives federal financial assistance, "one can hardly say that government action is not involved." (Plaintiff's brief, p. 5).

Plaintiff has apparently failed to make a distinction between "state action" and "government action," whether it be state or federal. Receipt of *federal* financial assistance has no bearing on whether defendant is operating under "color of *state* law." Further, the mere fact that a common carrier uses public property does not show "state action." Were that true, any private trucking company using state highways would be considered acting "under color of state law." The U.S. Supreme Court dealt with the issue of "state action" in regard to a regulated electric utility in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In *Jackson* the Court stated:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 462 (1952). It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107, supra* at 176. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. *Id.* at 350-351. (Footnotes omitted) (citations omitted).

The Court went on to find that there was no relationship between the utility's action and its monopoly status as would establish "state action," that the utility was not performing a "public function" since there was no obligation on the state to furnish utility service, that the state utility commission's approval of the utility's general tariff did not constitute state action, and that the state was not a joint participant in the utility's enterprise. In conclusion, the Court held:

> Metropolitan is a privately owned corporation, and it does not lease its facilities from the State of Pennsylvania. It alone is responsible for the provision of power to its customers. In common with all corporations of the State it pays taxes to the State, and it is subject to a form of extensive regulation by the State in a way that most other business enterprises are not. But this was likewise true of the ap-

pellant club in *Moose Lodge No. 107 v. Irvis, supra,* where we said:

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S., at 176-177.

All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment. *Id.* at 358.

Plaintiff in the instant case has not been able to show that the actions taken by defendant are distinguishable from those taken by Metropolitan in the *Jackson* case, nor has plaintiff shown any other salient facts that would establish the requisite "state action" for a claim under the Fourteenth Amendment.

The requirement in §1983 actions that the challenged activity be "under color of state law" is treated as equivalent to the "state action" requirement for actions under the Fourteenth Amendment. *Parks v. Mr. Ford,* 556 F.2d 132 (3rd Cir. 1977). Therefore, since defendant's activity did not constitute the required "state action" for purposes of the Fourteenth Amendment claim, it does not constitute "under color of state law" activity for the §1983 claim. Plaintiff's Fourteenth Amendment

claims, as well as his §1983 claims, therefore, will be dismissed.

Defendant next moves to dismiss plaintiff's claim under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (hereinafter §794). In essence, defendant contends that 42 U.S.C. §2000 d-3, which limits claims to those where a primary purpose of the federal funding was to provide employment, applies to the instant case and since creating employment was not a primary objective of the Regional Rail Reorganization Act of 1973, plaintiff has no cause of action under §794. Defendant further argues that even assuming plaintiff did have a cause of action under §794, his claim should be dismissed because plaintiff has failed to exhaust his administrative remedies.

Defendant does not contest that there is a right to bring a private action under §794. Despite the absence of express statutory language to that effect, a private right to sue has been found to exist.[1] *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Doe v. Colautti*, 454 F. Supp. 621 (E.D. Pa. 1978); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980). Defendant asserts, however, that any right to bring a private cause of action that may exist under §794 is coextensive with those provided for in Title VI of the 1964 Civil Rights Act. In support of this assertion, defendant points to §120(a) of the Comprehensive Rehabilitation Services Amendments of 1978, codified at 42 U. S. C. §794a(a)(2), which states:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.

1. The United States Supreme Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) held that there is an implied right in actions brought under Title IX of the 1964 Civil Rights Act, leaving little doubt of such a right under Title VI.

> 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act. [29 U. S. C. §794].

In addition, several courts have held that the rights, remedies, and procedures available under §794 are coextensive with those provided for in Title VI of the Civil Rights Act of 1964. *Trageser, supra; Carmi, supra*. This Court agrees in that finding.

Defendant further reasons that if the rights generated under §794 are the same as those available under Title VI, then any restrictions applicable to Title VI are equally applicable to §794. In particular, defendant contends that the restriction embodied in 42 U.S.C. §2000d-4 precludes plaintiff from stating a cause of action in the instant case. Section 2000d-4 provides:

> Nothing contained in this title [42 U. S. C. §§2000d -2000d-4] shall be construed to authorize action under this title [42 U. S. C. §§2000d-2000d-4] by any department or agency with respect to any employment practice of any employee, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

This section has been interpreted by the courts as precluding a judicial remedy under Title VI unless "(1) providing employment is a primary objective of the federal aid, or (2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid." *Trageser, supra* at 89. (Footnotes omitted). See also *Carmi, supra*. Further support of this view is found in 49 C.F.R. §§21.5(c)(1),(3)(1979).[2]

---

2. 249 C.F.R. §§21.5(c)(1),(3) reads as follows:

(c) Employment practices:

(1) Where a primary objective of a program of Federal fi-

Since actions brought under §794 are subject to the same restrictions as are actions initiated under Title VI, the restriction set out in 42 U.S.C. §2000d-3 is applicable in the instant case.[3] This finding requires the deter-

nancial assistance to which this part applies is to provide employment, a recipient or other party subject to this part shall not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, hiring, firing, upgrading, promotion, demotion, transfer, layoff, termination, rates of pay or other forms of compensation or benefits, selection for training or apprenticeship, use of facilities, and treatment of employees). Such recipient shall take affirmative action to insure that applicants are employed, and employees are treated during employment, without regard to their race, color, or national origin. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(2) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the grounds of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the provisions of paragraph (c)(1) of this section shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

3. Several courts have apparently not reached this conclusion. *Upshur v. Love*, 474 F. Supp. 332 (N.D. Cal. 1979) (court stated the school district received substantial amounts of federal funds but made no finding of a primary purpose of funds); *Doe v. Colautti*, 454 F. Supp. 621 (E.D. Pa. 1978)(no discussion of primary purpose); *David v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1979) (no discussion of primary purpose). One court has required such a low threshold to establish that a primary purpose of the federal funds is to provide employment as to effectively render the "primary" requirement meaningless. *Guardians Association of N.Y. City Police Department, Inc. v. Civil Service Commission*, 466 F. Supp. 1273 (S.D.N.Y. 1979).

mination of whether a primary objective of the Rail Act was to provide employment or whether the primary beneficiaries were discriminated against.

In 45 U.S.C. §701(b), the purposes of the Rail Act are listed as follows:

> (b) Purposes. — It is therefore declared to be the purpose of Congress in this Act to provide for —
>
> (1) The identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;
>
> (2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;
>
> (3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;
>
> (4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;
>
> (5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and
>
> (6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.

It is clear from the face of the statute that providing employment was not listed as a primary purpose of the Rail Act. This is not dispositive, however, of whether the primary beneficiaries are assured equality of opportunity

and nondiscriminatory treatment. The "final system plan," with which defendant is obliged to comply if it desires to continue to receive federal assistance[4], lists as one of its goals "the minimization of job losses and associated increases in unemployment and community benefit costs in areas in the region presently served by rail service."

In *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), the Supreme Court held "it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the petitioner." Earlier, the Court indicated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). See also *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978). It is not clear beyond doubt that plaintiff could, under no set of facts, support his claim as set forth in the complaint. Although the Court expresses no opinion on the matter, it is possible that plaintiff is a primary beneficiary under §794 and is therefore entitled to equal opportunity and nondiscriminatory treatment. If that be the case and the field tests were conducted as plaintiff alleges, then there is a possibility plaintiff could prevail. Again, the court stresses that this finding is not on the merits but pertains only to the disposition of the motion to dismiss. Because of the foregoing, the court must deny defendant's motion to dismiss plaintiff's claims under §794.

---

4. 45 U. S. C. §747, entitled "Protection of Federal Funds - (b) Report," provides that a report shall be submitted to Congress annually and shall include, *inter alia*, "the degree to which the goals of section 206(a) of this act [45 U. S. C. §716(a)] are being met."

Defendant argues that even if plaintiff has stated a valid claim under §794, his complaint should be dismissed because of his failure to exhaust administrative remedies. In light of the Supreme Court's ruling in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), it appears unlikely that exhaustion of administrative remedies would be required.[5] The Court rejected the argument that "individual suits are inappropriate in advance of exhaustion of administrative remedies," (*Id.* at 708 n. 41), noting that "the individual complainant is not allowed to participate in the investigation or subsequent enforcement proceedings, that a voluntary compliance agreement need not include relief for a complainant, and that a complete cut-off of federal funds was not an appropriate remedy for an individual complainant." *Upshur v. Love*, 474 F. Supp. 332, 341 n. 23 (N.D. Cal. 1979) (citing *Cannon, supra*, at 708 n. 41).

The court in *Upshur* found, however, that it need not decide whether or not plaintiff in a §794 action must exhaust administrative remedies, since at the time the complaint was filed no administrative remedies were available. *Upshur, supra* at 341. The administrative remedies available to the plaintiff in the instant case did not take effect until July 2, 1979. Plaintiff filed his complaint on September 22, 1978. Even if exhaustion of administrative remedies is required for claims under §794,

---

5. Although *Cannon* is a case involving Title IX, "the regulations implementing Section 504 [42 U.S.C. §794] adopt the Title VII enforcement procedures, 45 C.F.R. §84.61, the same administrative mechanisms used to enforce Title IX, 45 C.F.R. §86.71. Thus the concerns expressed by the Court in *Cannon* with respect to the adequacy of Title IX administrative remedies would also apply to complaints under Section 504 [42 U.S.C. §794]." *Upshur v. Love*, 474 F. Supp. 332, 341 n.23 (N.D. Cal. 1979).

that requirement would not be applicable in the instant case. Defendant's motion to dismiss for failure to exhaust administrative remedies will be denied.

Sylvia H. Rambo
United States District Judge

Dated: November 4, 1980

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LE STRANGE,
Plaintiff

v.

CONSOLIDATED RAIL CORPORATION,
Defendant

Civil Action
No. 78-0944

ORDER

NOW, THIS 4th day of November 1980, the following is ordered:

1. Defendant's motion to dismiss plaintiff's claim based upon the equal protection clause of the Fourteenth Amendment is granted.
2. Defendant's motion to dismiss plaintiff's claim based upon the Civil Rights Act, 42 U.S.C. §1983, is granted.
3. Defendant's motion to dismiss plaintiff's claim based upon section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, is denied.

A discussion of the relevant law is embodied in the memorandum filed herewith.

Sylvia H. Rambo
United States District Judge

AMENDED JUDGMENT
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LE STRANGE, *Plaintiff*	:	
v.	:	Civil Action No. 78-0944 Judgment
CONSOLIDATED RAIL CORPORATION, *Defendant*	:	

This action came before the Court, Honorable Sylvia H. Rambo, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that pursuant to the Opinion and Order filed on October 20, 1981, judgment be and hereby is entered in favor of the defendant CONSOLIDATED RAIL CORPORATION and against the plaintiff THOMAS LE STRANGE on the issue of plaintiff's standing to bring a private action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

Dated at Harrisburg, Pennsylvania, this 29th day of October 1981.

_____

Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 81-2943
LESTRANGE, THOMAS
v.
CONSOLIDATED RAIL CORPORATION
Thomas J. LeStrange, *Appellant*
(D.C. Civil No. 78-0944)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA —
SCRANTON

Present: ADAMS and WEIS, *Circuit Judges* and BLOCH, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit, Rule 12(6), June 8, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 26, 1981, be, and the same is hereby reversed and the cause remanded for further proceedings in accordance with the opinion of this Court. Costs taxed against appellee.

ATTEST:

Clerk

September 1, 1982

---

* The Honorable Alan Bloch, United States District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 81-2943
Re: THOMAS LE STRANGE, *Appellant*
v.
CONSOLIDATED RAIL CORPORATION

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until October 22, 1982.

Circuit Judge

Dated: September 21, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 81-2943
THOMAS LE STRANGE, *Appellant*
v.
CONSOLIDATED RAIL CORPORATION

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until November 22, 1982.

Circuit Judge

Dated: October 25, 1982